No. 7773

In the United States Circuit Court of Appeals for the Ninth Circuit

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; LEE STODDARD, OTTO GLADDEN, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, CASSIUS ROBINSON, S. H. MCEUEN AND C. C. HODGE, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

BRIEF OF HAROLD L. ICKES AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

HENRY T. HUNT,
Special Assistant to the Attorney General.

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CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. Coe, Mayor; A. Grantham, Treasurer; William T. Reed, Clerk; Lee Stoddard, Otto Gladden, Frank H. Lafrenz, Joseph Loizel, O. M. Husted, Cassius Robinson, S. H. McEuen, and C. C. Hodge, Members of the City Council of said City of Coeur d'Alene, Idaho; and Harold L. Ickes, as Federal Emergency Administrator of Public Works, appellants

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

BRIEF OF HAROLD L. ICKES AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

NATURE OF THE SUIT

This is an appeal from the order of the District Court of the United States for the District of Idaho, Northern Division, filed December 13, 1934,

denying the defendants' motion to dismiss (Tr. p. 162) and from an order filed December 30, 1934, granting an injunction *pendente lite* restraining the defendants from proceeding with the construction of the municipal electric generating plant and distribution system described in the bill or the financing thereof with funds of the Federal Emergency Administration of Public Works (Tr. pp. 190–196).

SPECIFICATION OF ERRORS

The errors assigned are:

1. The court erred in granting the injunction *pendente lite*.

2. In finding that the proposed loan and grant agreement is not for the purpose of unemployment relief but to foster and encourage municipal ownership and to regulate rates and charges for electric service.

3. In finding that the proposed contract is an illegal attempt to usurp the functions of the State of Idaho and is beyond the powers of the National Government.

4 and 5. In finding that the proposed loan and grant is unauthorized and unconstitutional.

6. In finding that the said loan and grant amounts to the incurring of an indebtedness or liability in excess of $300,000 in violation of the Constitution of the State of Idaho.

7. In finding that if said loan is made it will result in direct and/or immediate and/or irreparable loss and damage to the plaintiff.

8. In finding that the amended bill of complaint stated any grounds for the granting of an injunction *pendente lite.*

9 and 10. In finding that the amended bill stated facts sufficient to constitute a valid cause of action in equity or to entitle the plaintiff to equitable relief.

11 and 12. In denying the motions of the defendants to dismiss the amended bill.

SUMMARY OF AMENDED BILL

The appellee, plaintiff below, is a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of the State of Washington, and is authorized to do business in the State of Idaho and to hold property in said State.

The City of Coeur d'Alene, defendant below, is a municipal corporation created under and by virtue of the laws of Idaho and a citizen of said State.

The defendant, Harold L. Ickes, is the appointed and duly acting Federal Emergency Administrator of Public Works appointed under the provisions of Title II of the National Industrial Recovery Act.

The jurisdiction of the United States District Court for the District of Idaho is invoked upon the ground that the suit is of a civil nature, arises under the Constitution of the United States, involves the Fifth Amendment and Section 1 of the

Fourteenth Amendment, and the constitutionality, construction, and interpretation of the National Industrial Recovery Act. Diversity of citizenship is also alleged.

The plaintiff is authorized to engage in the sale of electric energy within the cities in the State of Idaho. It is the holder of a franchise, dated October 19, 1903, granted to its predecessor for furnishing to the inhabitants of the Village of Coeur d'Alene electricity for lighting and other purposes for fifty years from the date thereof. In 1930 the plaintiff purchased the electric power distribution system of the City and has since owned, maintained and operated it. Plaintiff has expended more than $33,000 in improving said system and $27,000 for new transformers. Its rates are subject to regulation by the Public Utilities Commission of Idaho. It furnishes electrical service to all classes of customers in the City, in number 2,377, and also furnishes service to 332 additional customers residing in adjacent territory. It has an investment in the distribution system of more than $200,000.

The plaintiff is also a taxpayer of the United States, of the State of Idaho, of the County of Kootenai, and of the City of Coeur d'Alene.

The amended bill recites certain proceedings of the City calling an election for the purpose of submitting to the voters the proposition for incurring an indebtedness of $300,000 by the issuance of gen-

eral obligation bonds of the City to pay the cost and expense of the acquisition by purchase or by construction of a municipal light and power plant and distribution system, the proceedings of the City Council in adopting an ordinance (No. 713), providing for the incurring of indebtedness of $300,000 for the said electric system and also an ordinance for the incurring of a further indebtedness of $300,000 (No. 723, total $504,000 including the $300,000) to finance the cost of the acquisition by purchase or construction of a waterworks system. An election was provided for in each of the ordinances and was called and held on December 12, 1933. It resulted in the approval of both propositions by more than two-thirds of the voters voting. Thereafter, and pursuant to a motion of the City Council authorizing the City officers to apply to the Federal Emergency Administration of Public Works for the necessary funds, said officers made an application to finance the cost of construction of the electric and waterworks systems in the amount of $650,000, including a grant equal to 30% of the cost of labor and materials to be used in the said construction. The Administrator has approved the said application and will advance funds to the City in the amount of $337,580 for the purpose of constructing the electric system, which sum includes the amount of the grant.

The amended bill charges that the incurring of an indebtedness or liability exceeding the annual

income and revenue of the City for "that year" without the assent of two-thirds of the qualified voters voting at an election held for the purpose and without provision being made for the collection of an annual tax sufficient to pay the interest and provide a sinking fund for such indebtedness and/or liability is in violation of Section 3 of Article VIII of the Idaho Constitution.

An engineer employed by the City made a report, which was published and influenced the voters at the election. Said report was erroneous, among other things, in not disclosing that two sections of the City were omitted from the distribution system. The erroneous statements in the report deceived the voters into voting favorably on the questions submitted.

That injury which will result from the accomplishment of the City's construction of the electric system in that the plaintiff will be compelled either to compete with the City and suffer substantial loss or abandon business in Coeur d'Alene. In case of abandonment certain classes of employees of the plaintiff will be discharged and the number of others reduced. Through this loss the plaintiff will be compelled to serve other customers at a loss or with less profit. The action of the Administrator of Public Works in making a loan and grant to the City for the purpose stated is an abuse of discretion granted him by the National Industrial Recovery Act.

The amended bill further sets out a press release of the Administrator which declares his policy as to applications of municipalities to finance municipal electric systems, the purport of which is that such applications will be approved only where it appears that the municipal system will effectuate a reduction of rates below those charged by utility corporations, with opportunity before the municipal system is financed to such corporations to reduce rates in the City applying. This policy shows that the loan and grant is not primarily to provide employment but to effectuate a reduction of rates, whereas the regulation of rates is a matter for the State of Idaho through its Utilities Commission.

The amended bill further alleged that on November 20, 1934, the City received from the Administrator a proposed contract providing for a loan and grant not in excess of the amount of $650,000 for the financing of the City's water system, generating plant, and electric distribution system, that the agreement was thereupon executed by the City. The proposed agreement is attached to the amended bill, made a part thereof, and appears, Transcript of Record, Exhibit D, p. 91 et seq.

The amended bill charges that the actions and proceedings already taken in pursuance of the City's plan and the threatened actions which defendants are about to take under such plan are unlawful as:

1. The misleading statements made by the City officers deceived the voters and vitiated election;

2. They concealed from the voters the fact that two sections of the City would not be included within the area to be served whereby also the election was vitiated;

3 and 8. Section 3, Article VIII, Idaho Constitution, provides that no City shall incur any indebtedness for any purpose exceeding "in that year the income and revenue provided for it during such year without the assent of two-thirds of the qualified voters, nor unless provision is made for an annual tax to pay the interest and to constitute a sinking fund for the payment of the principal within twenty years from the time of contracting the indebtedness." It is claimed that the plan of the City officers requires an indebtedness in excess of $300,000 (the amount approved at the election) for said plant and distribution system within the meaning of said Article;

4. Ordinance No. 723, Exhibit C of the complaint, and the proposed loan and grant agreement provide for the water system, together with the electric system; whereas the ordinance calling for the election (No. 713) provides only for the submission to the voters of the electric system, the plan of the City involves the incurring of an indebtedness of $650,000, less the grant but the voters have authorized only an indebtedness of $300,000;

5, 6, and 7. The Recovery Act does not authorize the Administrator to loan or grant moneys of the

Federal Government for the building of municipal electric systems;

9. The City does not propose to engage in interstate commerce;

10. The proposed loan and grant would be illegal and the City would be required to repay it and would thereby become indebted in excess of the amount authorized by Section 3 of Article VIII, Idaho Constitution;

11. The issuance of the bonds and the proposed use of the proceeds and of the proposed grant are in violation of the Fifth Amendment and Section 1 of the Fourteenth Amendment of the National Constitution in that the plaintiff would be thereby deprived of its property without due process of law;

12 and 13. Congress has no power to make a loan or grant of public moneys of the United States to the City of Coeur d'Alene for the purposes stated, and is prohibited from providing such loan and grant by the Fifth and Fourteenth Amendments;

14, 17, and 18. If Congress has power to make such a loan and grant it may not lawfully delegate that power;

15, 18, and 22. The loan and grant is only of local and not of general benefit, hence it does not tend to provide for the general welfare of the United States;

19 and 20. The action of the Administrator is an abuse of discretion;

21. Such disbursement of national funds is unlawful under the Tenth Amendment in view of the policy declaration of the Administrator and is ultra vires.

In substance the bill charges that the plaintiff will suffer illegal injury directly through the performance of the loan and grant agreement; that it is not authorized by the Recovery Act, is an abuse of discretion; that the Act is an unlawful delegation of legislative power; that insofar as it purports to authorize the financing by loan and grant of such projects it is beyond the power of Congress, being not an exercise of powers delegated to Congress by the Constitution; is a violation of the Fifth Amendment and, in conjunction with the City's participation, a violation of the Fourteenth Amendment; and as construed by the Administrator in his policy declaration in violation of the Tenth Amendment.

SUMMARY OF LOAN AND GRANT AGREEMENT

The District Court enjoined the defendants from

> * * * proceedings with * * * the construction of the municipal electric generating plant and distribution system, or the financing thereof with Federal Emergency Administration of Public Works funds or gifts or grants, or from issuing, pledging, selling, or delivering any bonds of said city which are purported to be authorized by said Ordinance No. 713, with Fed-

> eral Administration of Public Works, or accepting, using, or applying any moneys, the proceeds of any loan, grant, or gift from the Federal Emergency Administration of Public Works for any of said purposes (Tr. p. 195).

As the loan and grant agreement expresses the entire intention of the Administrator and the City with regard to the purchase of the bonds and the grant, and it is the performance of this agreement which is challenged as illegal and as threatening injury to appellee, it is necessary that this court be apprised of its provisions. It is set forth in the Transcript of Record beginning page 91.

Part I provides that, subject to the terms and conditions stated, the Government will by loan and grant, not exceeding in the aggregate the sum of $650,000, aid the City in financing a project consisting substantially of the construction of a water system, including sinking wells, installing pumps, and a distribution system for water service; also a Diesel engine generating plant and electric distribution system.

The financing is by means of a loan (purchase of bonds) and a grant. The City agrees to sell and the Government to buy at the principal amount thereof, plus accrued interest, $504,000 of certain bonds (if not purchased by others).

The Government will also make and the Borrower will accept, whether or not any or all of the

bonds are sold to other purchasers, a grant in an amount equal to thirty percentum of the cost of labor and materials employed upon the project. If all the bonds are sold to other purchasers the Government will make the entire grant with the payment of money. In no event shall the grant be in excess of $175,000.

The Borrower is required to deposit the proceeds of the sale of bonds and the grant in construction accounts and to apply them solely to the cost of construction of the project or to the extinguishment of the bonds or interest. The Borrower is required to commence the construction of the project upon receipt of the first bond payment and continue it to completion with all practicable dispatch.

The Government is not required to purchase any bonds unless the Borrower adopts a rate and bond ordinance providing that no donations, taxes, depreciation charges, or any other items of expense, except normal operating expenses and maintenance, together with water, light, and power-line extensions, shall be charged against the revenues of the project.

All municipally used water and electric energy shall be paid for at current selling-rate schedules, except water used in fighting fire, and a reasonable rent shall be paid for hydrant rental, all such payments to be made as the service accrues from the general funds of the Borrower into the funds of the Borrower's water and electric departments (Tr. p. 104).

The Borrower covenants that when electrical energy from the Government power project at Grand Coulee, Washington, is available at rates such that the cost thereof to the Borrower shall be less than the cost thereof delivered from the Diesel engine generating plant, the Borrower will cease active operations of such Diesel plant and place it on a standby basis only, and will puchase its electric energy requirements from the said Government power project.

Part II. In consideration of the grant the Borrower covenants that all work on the project shall be subject to the rules adopted by the Administrator to carry out the purposes and control the administration of the Act (no convict labor, hours per week not to be in excess of thirty hours, wages not to be less than the hourly wage rates for skilled and unskilled labor prescribed by the Administrator or those provided by collective agreements, preferences to ex-service men with dependents and to local residents, compliance with Section 7 (a) of Title I of the Recovery Act, the contractor to comply with codes established under Section 1 of the Act).

The amended bill incorporates this agreement. No other action than that expressed in the agreement is contemplated by the Administrator and the bill contains no allegations that the Administrator intends any other action except that it sets out a letter, dated November 21, 1934, from the Federal Emergency Administration of Public

Works to the Mayor of Coeur d'Alene requiring in further consideration of the grant the enactment of a rate ordinance by the City whereby its electric rates should be fixed on a basis approximately 20% below the existing rates (those charged by the appellee) (Tr. pp. 55–56).

The date (not shown in the transcript) of the loan and grant agreement as shown by the certificate attached thereto is December 17, 1934. It was executed by the City later. It does not contain the condition as to the rate ordinance set out in the letter of November 21. It appears, therefore, that the Administrator has waived the requirements expressed in that letter.

As the loan and grant agreement expresses the entire understanding between the City of Coeur d'Alene and the Government the following discussion will be based upon that agreement. Insofar as the amended bill raises questions under the law of the State of Idaho that subject will be left to counsel for the City. This brief is confined to the Federal questions presented.

The amended bill challenges only the purchase by the Government of the bonds issued for the electric system ($300,000) and not those for the waterworks ($204,000).

The loan and grant agreement provides for the purchase of both issues ($504,000) by the Government, if not sold to others. The injunction restrains the sale to the Government only of the $300,000 issue.

THE FEDERAL QUESTIONS PRESENTED

Assuming that the appellee shows a sufficient interest to challenge the constitutionality of Title II, Sections 202 and 203, of N. I. R. A., this suit presents the question whether the National Government, to meet an emergency caused by the collapse of the economic system whereby some ten million workers are without employment and hence lack means of subsistence, may finance the provision of employment by the purchase of bonds of States and public bodies thereof authorized by State law. The Federal Emergency Administration of Public Works, established by the President pursuant to the Authority of Title II of said Act is one of the emergency agencies created by Acts of Congress to restore the functioning of the nation's economic system. That Administration is a planning agency in the field of construction of public works. Its duty is to prepare a comprehensive program of public works (Federal and non-Federal). This program is established by including from time to time such projects when they are found to be socially desirable, provide employment both by direct labor and by the fabrication and transportation of materials, are engineeringly sound, and legally authorized. The prima facie determination of these questions is by the several divisions of the Administrator's staff. The recommendation of these divisions, coordinated by the Deputy Administrator, are presented to the Administrator who, with the advice of the Special

Board of Public Works, composed of Cabinet officers and others appointed to that duty by the President, determines to include or not to include them in the comprehensive program, and if included to finance them (in the case of non-Federal projects) by loans and grants, the loan being a bond purchase sufficient with the grant to finance or aid in financing the cost of the project. The foregoing process results in an allotment which is made to the applicant public body, subject to the execution of a contract satisfactory to the Administrator. The allotment includes a grant not to exceed 30% of the estimated cost of labor and materials employed upon the project (Section 203). This contract, briefly described, provides for the purchase of the applicant's bonds carrying 4% interest and for the payment of the grant as the work is done. Only such bonds are purchased as are not sold to other purchasers. The contract carries conditions effectuating the purposes of the Act (the provision of employment, just and reasonable wages, veterans' and local preference, etc., Section 206). The total allotments made to finance electric projects of cities, counties, districts, and other public bodies to March 16, 1935, aggregated $41,920,131. Certain of these allotments are to finance such projects where nonexclusive franchises to utility companies are in effect. In others the franchises have expired. In a number of instances the allotments are limited to electric works serving only the munici-

pal uses. A number of instances are grants only. Litigation at the instance of utility companies is pending with regard to the allotment or loan and grant agreement to Middlesboro, Kentucky; Hominy, Oklahoma; Burlington, Kansas; Kennett, Missouri; Concordia, Missouri; California, Missouri; Sheffield and Tuscumbia, Alabama; Greenwood County, South Carolina; Florence, Alabama; Trenton, Missouri; La Plata, Missouri; Menominee, Michigan; Coeur d'Alene, Idaho; Independence, Kansas, Columbus, Ohio; Fort Collins, Colorado; Centralia, Illinois; Knoxville, Tennessee. Litigation has been concluded in the case of Allegan, Michigan.

The *Allegan* case (*Allegan* v. *Consumers Power Company,* 71 Fed. (2d) 477) presented the question whether the Power Company's bill showed sufficient interest as a taxpayer to challenge the legality of the loan and grant. The Circuit Court of Appeals of the Sixth Circuit dismissed the bill. Certiorari was denied by the Supreme Court, October 8, 1934.

In *Arkansas Missouri Power Company* v. *City of Kennett, Missouri,* No. 753 in Equity, District Court, Southeastern Division of the Eastern District of Missouri, February 25, 1935, the court granted the defendants' motion to dismiss. (Not yet reported.) Appeal bond of $25,000 required.

In *Missouri Utilities Company* v. *City of California,* 8 Fed. Supp. 454, the United States District

Court (Missouri) granted defendants' motion to dismiss. An appeal is pending.

In *Missouri Public Service Company* v. *Concordia* (Missouri), reported 8 Fed. Supp. 1, the Missouri District Court denied a motion to dismiss. This case is set for trial on the merits.

In *Missouri Public Service Company* v. *Trenton* (Missouri), the District Judge ordered the bill dismissed. Appeal is pending before the Circuit Court of Appeals of the Eighth Circuit, May 8. Appeal was conditioned upon the filing of a bond in the sum of $50,000.

In *Kansas Gas and Electric Company* v. *City of Independence, Kansas,* the District Court of Kansas, Third Division, ordered the bill dismissed. This case was submitted to the Circuit Court of Appeals of the Tenth Circuit, March 26, 1935.

In *Missouri Power and Light Company* v. *City of La Plata, Missouri,* the District Court ordered the bill dismissed. Motion for rehearing is pending.

Bills of the same nature as that in the present case are pending as follows:

Public Service Company of Colorado v. *City of Fort Collins,* United States District Court for Colorado.

Illinois Power and Light Company v. *City of Centralia, Illinois,* United States District Court, Eastern District of Illinois.

Menominee and Marinette Light and Traction Co. v. *Menominee, Michigan.* Proceedings are

pending for removal to the United States District Court for the Western District of Michigan, Northern Division.

The following litigation is pending in the State courts:

Kansas Utility Company v. *City of Burlington, Kansas.* The State Court ordered the bill dismissed. This case is in process of appeal to the Supreme Court of Kansas.

Tennessee Public Service Company v. *City of Knoxville*, pending in the State Court of Knox County.

There is also the suit brought by preferred stockholders of the Alabama Power Company to restrain that Company from performing a contract for the sale of its transmission lines to the T. V. A. (*Ashwander, et al.* v. *Alabama Power Company*). The Tennessee Valley Authority and certain Alabama cities with which the Administrator has made contracts to purchase their bonds are joined as defendants. The District Court, William I. Grubb, J., found the Alabama Power-T. V. A. contract ultra vires, and as the Administrator's contracts for the purchase of the cities' bonds are conditioned upon the purchase of power from the T. V. A. the cities were enjoined from accepting P. W. A. loans and grants by reason of the said condition. Appeal is in process to the Circuit Court of Appeals of the Fifth Circuit.

As stated above, Title II of N. I. R. A. is a part of the legislation adopted by Congress to restore

the functioning of the nation's economic system by appropriations for loans, etc., to finance construction and hence employment.

The legality of the acts creating the emergency agencies referred to is related to the spending power of Congress. The operations of the agencies created are not limited to Federal activities. Vast sums have been applied to improvement of private property or to the promotion of private interests. They are, however, related to the promotion of purposes declared national by the Congress, such as the provision of employment on a national scale.

The importance of the financing of non-Federal projects as an aid to recovery may be estimated from the grand total of estimated costs and man-hours as shown by the report of the Division of Economics and Statistics, P. W. A. as of February 1, 1935. Expenditures to that date excluding railroad loans are $178,701,795. The estimated total cost was $690,065,616. Man-hours applied to that date, 84,629,420. The total estimated man-hours was 318,236,513. The total number of men at work during the month of January was 74,212. This figure reflects the winter season.

ARGUMENT

The performance of the loan-and-grant agreement will cause no legal injury to the appellee

Before plaintiff may challenge the constitutionality of an act of Congress, it must show that

the acts of a Government officer which are claimed to be illegal, threaten direct injury to the plaintiff's legal rights. The rule that a direct injury must be shown as a basis for challenging the constitutionality of an act of Congress has been established by many decisions of the Supreme Court of the United States. In *Frothingham* v. *Mellon,* 262 U. S. 447, the plaintiff attacked the constitutionality of the "Maternity Act" (42 Stat. 224). At page 488 the court said:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. * * * We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. *That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.* Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of

> the enforcement of a legal right. *The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement*, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding.

Cited with approval *Williams* v. *Riley,* 280 U. S. 78, 80.

In *Heald* v. *District of Columbia,* 259 U. S. 114 (1922), the plaintiff challenged the constitutionality of an act of Congress levying a tax on intangible property of the residents of the District of Columbia. The challenge was that the scope of the tax included municipal bonds but it did not appear that the plaintiff had any such bonds. Mr. Justice Brandeis, speaking for the court, said, p. 123:

> It has been repeatedly held that one who would strike down a State statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. (Citing cases.) In no case has it been held that a different rule applies where the statute assailed is an act of Congress nor has any good reason been suggested why it should be so held.

Fairchild v. *Hughes,* 258 U. S. 126, was an attack on the constitutionality of the Suffrage Amendment (the 19th). The court said, p. 129:

> Plaintiff's alleged interest in the question submitted (the validity of alleged acts of ratification by the States) is not such as to afford a basis for this proceeding. It is frankly a proceeding to have the Nineteenth Amendment declared void. In form it is a bill in equity but it is not a case within the meaning of paragraph 2 of Article III of the Constitution which confers judicial powers on the Federal courts, for no claim of plaintiff is "brought before the court for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights or the prevention, redress, or punishment of wrong." * * * Plaintiff has only the right possessed by every citizen to require that the Government administer according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the Federal courts a suit to secure by indirection a determination whether a statute if passed, or a constitutional amendment about to be adopted, will be valid.

It is well established that it is not the province of the Federal courts to determine questions of law *in thesi.* There must be a litigation upon actual transactions between real parties growing out of a controversy affecting legal or equitable rights as to

person or property. *Marye* v. *Parsons,* 114 U. S. 325, 330.

In *Muskrat* v. *United States,* 219 U. S. 346, at 361, 362, the Supreme Court declared:

> That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. * * *

See also *New Jersey* v. *Sargent, Attorney General,* 269 U. S. 328, 330–334.

From a review of the decisions of the Supreme Court requiring that a plaintiff attacking the constitutionality of an act of Congress show that he has suffered some direct injury, it would seem that an injury to any legal or equitable right (that is an unlawful invasion of such right) cannot result from Federal expenditures. In the

Mellon case the court said the constitutionality of an act of Congress "may be considered only when the justification for some direct injury suffered or threatened presenting a justiciable issue is made to rest upon such an act." Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment which otherwise would stand in the way of an enforcement of a legal right. In other words, even a direct injury to some right of the plaintiff cannot be prevented by the courts if such injury has the justification of a valid act of Congress. But here there is a lack of injury and hence no need for justification. What the plaintiff will suffer from the competition of the defendant city is a possible loss of business in a competitive market through the city's competition—a mere *damnum;* and even this *damnum* does not arise from the performance of the loan and grant agreement. The *damnum,* if any, results from the exercise of the city's right to compete with the company invested in the city by the law of Idaho. The competitive advantage, if any, of the city, arises from the improvement in the arts since the establishment of the plaintiff's system, freedom from the necessity of earning a profit, and lower financing costs through the loan and grant. But the plaintiff below has no legal right to any particular inter-

est rate or terms of financing. It may be that the 4% rate and the grant provided by the agreement is less than the market rate from private lenders. But if the private interest rate were equal to or lower than the Government rates the *damnum* to the plaintiff would be the same.

The Supreme Court speaks of "justification" and of the "enforcement" of the statute which negatives the injury. Obviously a loan or grant which the borrower is free to accept or not cannot "injure" a third party. A statute which, like Sections 202 and 203, constitutes directions to the Executive as to the expenditure of an appropriation is not an enforcing statute. The fact is that (no tax liability being created) a Federal contribution to a public enterprise authorized by state law cannot be an "injury" to anyone.

It is not the law that a loan or a gift to an enterprise, whether that of a municipality or other person or corporation, to aid it in financing a project competitive with a private corporation is a legal injury to such corporation. The mere statement of such a principle carries its denial. If such a private loan or grant cannot constitute a legal injury, it is difficult to understand why one from the Government should do so.

Appellee maintains that the performance of the said agreement will cause it injury in each of two capacities, first, as a public utility company holding a nonexclusive franchise empowering it to sell

electrical energy in the City of Coeur d'Alene to such persons as may wish to buy it, and, second, as a taxpayer threatened with an assessment by the City to repay to the Government the proceeds of an illegal loan and grant.

The franchise referred to is set out as Exhibit B to the amended bill (Tr. p. 84 et seq.). It grants the right to the Consumers Company (appellee's predecessor) of furnishing the Village of Coeur d'Alene and the inhabitants thereof with electricity, with lighting, heating power, and other purposes for which it may be adapted, for the period of fifty years from the date thereof (October 19, 1903).

Such franchises have been construed to be nonexclusive. Appellee makes no contention that this franchise grants it a monopoly.

The appellee relies, however, upon the doctrine of "illegal competition" first declared in *Arkansas Missouri Power Company* v. *City of Campbell,* 55 Fed. (2d) 560. In that case the plaintiff was the holder of a nonexclusive franchise which, however, was held exclusive "against anyone who assumed to exercise the privileges granted plaintiff in the absence of authority or in defiance of law." In the *Campbell* case the particular in which the City of Campbell assumed to exercise such a privilege in defiance of law was a provision of the contract with the contractor for construction which required the City to exercise its taxing power. The law of

Missouri did not authorize it to exercise that power in the circumstances presented.

The Judge who wrote the decision in the *Campbell* case, the Honorable C. J. Faris, has recently had occasion to determine the application of the doctrine there stated in a suit challenging the legality of a Federal loan and grant. (*Arkansas Missouri Power Company* v. *City of Kennett,* No. 753 in Equity, District Court of the United States, Southeastern Division, Eastern District of Missouri), February 25, 1935. On the subject of the standing of the plaintiff to attack the validity of Sections 202 and 203 and the loan and grant to the City of Kennett the court said:

> May plaintiff attack, in the action at bar, the validity of Sections 202 and 203, *supra,* because it has valuable property in the City of Kennett, which will be depreciated in value, if not wholly destroyed, if the City of Kennett shall construct and operate the proposed municipal plant? I am of the view that this is the decisive question here; because, if defendant Ickes, acting under a valid statute, may buy these bonds of, and award this gratuity to, the defendant City, the case is ended in favor of the defendants. The Bonds are valid; the City has the legal right to issue them and to sell them anywhere it can find a purchaser, as, also, the power to use the proceeds thereof to erect, and thereafter maintain and operate the plant, and to furnish therefrom to itself and to its citizens electrical energy. The objection urged by

plaintiff goes only to the purchaser and to his legal right to lay out public money in the manner and for the purposes contemplated.

If plaintiff shall be hurt, and it must be assumed, for the uses of the motion (to dismiss the suit), that it shall be, will that hurt be a necessary and direct consequence of what defendant Ickes purposes to do, or what the City has the legal power to do and purposes doing? In short, is the contemplated injury the act of Ickes under the federal statute attacked, or the act of the City? Clearly, the latter. For, even if the two sections of the National Industrial Recovery Act challenged here by plaintiff had never been passed, the City of Kennett could, and undoubtedly would, have built the plant with the selfsame proceeds of the bonds herein, which it would have sold to some other buyer.

If it be urged that the $30,000 gratuity is not in the same category as the purchase of the $120,000 of bonds, the answer is that it fairly appears that the issue of $140,000 in bonds was, when the matter was begun, deemed sufficient to build the plant, and that the present arrangement is a mere fortuitous thing.

So, the action here, even if it can be maintained, is a mere stop gap. It settles nothing of any value to plaintiff, and can afford plaintiff no permanent relief.

In the case of *City of Campbell* v. *Arkansas-Missouri Power Company*, 55 Fed.

(2d) 560, greatly relied on by plaintiff here, the right to issue the bonds there in question and to lay the tax with which to pay them, was wholly vulnerable. Plaintiff there had an existing franchise (if that be relevant); the City of Campbell was trying to do an act in the teeth of the Constitution of Missouri, which unlawful act would result in the injury of the plaintiff there. In the case at bar the situation is wholly different. The attack is here made on the buyer of the bonds, not on the City, the act of which alone causes the hurt to plaintiff, but which is itself legally invulnerable. The action here will settle nothing finally. If carried by plaintiff to a successful conclusion, such conclusion will stop the defendant City in doing the act hurtful to plaintiff only until it shall be able to find another buyer for its bonds.

I repeat, I am mindful, of course, that a gift of $30,000 is involved, but it must be borne in mind, as said already, that the total issue of bonds voted amounted to $140,000; so, it is obvious that the failure of the gift would not afford an insurmountable barrier to the construction of the plant. It appears from the contract that the difference perhaps involved arises from divers conditions put by the proposed agreement on labor, hours, and material.

So, I am driven to the conclusion that plaintiff's hurt will accrue directly from an act which the City of Kennett purposes do-

> ing, and which it has the legal power to do, and that the hurt from the threatened act of defendant Ickes is fortuitous merely, and not at all the direct cause of the thing of which plaintiff complains.

The injury which the appellee must show as a basis for its suit is an unlawful invasion of some legal right. The injury which the appellee claims here is not a legal injury but a mere *damnum*. It has no monopoly in Coeur d'Alene. Its business there has always been subject to the risk of municipal competition. The City has now and has long had a right conferred on it by the laws of Idaho to construct and operate a municipal electric system in competition with the Washington Water Power Company. Whatever loss the Company may suffer by reason of the City's competition is not the result of an invasion of any right to be free of such competition, for such right does not exist.

Furthermore, the loss or *damnum* which the Company may suffer does not result from the Administrator's loan and grant. As pointed out by Judge Faris it results from the freedom of the City to compete. By the loan and grant agreement the Administrator agrees to buy such bonds as the City may not sell to others. The City is free to sell to others and may do so. If it does the resultant *damnum* would be precisely the same. A loan (ultra vires of the lender's powers or not)

to a competitor has never been regarded as a legal injury to another competing in the same field.

Neither is the grant the cause of the *damnum* to the Company. If it be not the cause its legality or illegality (ultra vires of the grantor's powers) is immaterial.

The doctrine of the *Campbell* case has been followed in a number of cases but in each of them the illegality which supports a suit to enjoin municipal competition is an illegality inherent in the City's action. No case appears in which that illegality is not the illegal exercise of the City's taxing power.

In *Railroad Company* v. *Ellerman,* 105 U. S. 166, the Supreme Court had before it a situation analogous to that presented by this case. The City of New Orleans had made a contract with Ellerman empowering him to keep in repair certain municipally owned wharves and to collect certain charges. The Railroad Company, by authority of an act of the General Assembly of Louisiana, made available to shippers, exempt from the payment of all levies and wharf dues due the City of New Orleans, a wharf owned by the Railroad Company. The effect of this action was to open a rival wharf in competition with Ellerman free of burdens which Ellerman's customers were required to bear. The court determined that Ellerman had not a sufficient legal interest to entitle him to enjoin the Company from using its wharf as a public wharf free

of the City's charges. The court said as the competition was not illegal Ellerman had no such interest. The claimed illegality consisted in the allegation that such use of the Railroad's wharf was *ultra vires* of the Railroad Company's powers. The court said:

> But if the competition in itself, however injurious, is not a wrong of which he (Ellerman) could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires?* The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for anyone to compete with the company, although the latter may not be authorized to engage in the same business. The legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. * * * The only injury of which he (Ellerman) can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is that a violation of its

> charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed (pp. 173–174).

In *City of Paragould* v. *Arkansas Utilities Company,* 70 Fed. (2d) 530, the court says that—

> Grants of special franchises and privileges are to be strictly construed in favor of the public right and nothing is to be taken for granted concerning which any reasonable doubt may be raised. (Citing *Louisville Bridge Co.* v. *U. S.,* 242 U. S. 409.)

Gambles v. *P & R. R. R. Co.,* Fed. Cases No. 2331; *New England R. Co.* v. *Central R. & E. Co.,* 69 Conn. 56, 36 Atl. 1061; *Burns* v. *St. Paul,* 101 Minn. 663, 112 N. W. 412 (1907); *Fletcher Cyc. Corp.,* Vol. 3, Sec. 1528.

The appellee will doubtless rely upon *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515. It there appeared that by a statute of Oklahoma, passed in 1915, cotton gins were declared to be public utilities, to be operated under permits from the State Corporation Commission. No gin could be operated without a license from the Commission and a satisfactory showing of public necessity. In 1925 the Legislature added a proviso whereby gins run cooperatively were to be given a license free of a showing of public necessity. The plaintiff Frost, who had been required to make such a showing, brought suit to enjoin the issuance of the license upon the ground that the proviso

was invalid, as contravening the due process and equal protection of the law clauses of the Fourteenth Amendment. The court held that the right to operate a gin and collect tolls therefor, as provided by the Oklahoma statute, was not a mere license but a franchise, and constituted a property right within the protection of the Fourteenth Amendment; that, while the right acquired did not preclude the State from making similar valid grants to others, it was exclusive against any person attempting to operate a competing gin without a permit or under a void permit and that a suit in equity by a licensee would lie against an invasion of his rights under the franchise.

In the present case the City of Coeur d'Alene has never been required to obtain a certificate of convenience and necessity. The appellee would have no rights whatever in Coeur d'Alene in the absence of action of the City giving it a right to the use of the streets or otherwise. Frost was not under the necessity of obtaining any local consent to the operation of his gin.

The Circuit Court of Appeals of the Eighth Circuit had occasion in *City of Paragould* v. *Arkansas Utilities Company, supra,* Sanborn, J., to ascertain the effect of the *Frost* case. In the *Paragould* case the Utilities Company had an indeterminate permit for which it had surrendered its nonexclusive fifty-year franchise under which the City retained the right to grant similar franchises to others and

to build its own plant. The indeterminate permit authorized the Company to "operate said electric light and power plant and distribution system within said City of Paragould, Arkansas, subject to all the terms, conditions, and limitations prescribed in Act No. 571 of the regular session of the 19th General Assembly of the State of Arkansas." At the time the Company received its indeterminate permit the law of Arkansas required a City to obtain a certificate of convenience and necessity as a condition precedent to its engaging in the electric business. A few days after such permit was received, the General Assembly of the State amended the law whereby the necessity of a certificate to a city was abolished. The suit was to enjoin the municipality from building its competing power plant. The court dismissed the injunction granted below and remanded the case with directions to dismiss the bill, p. 535. It states the question before it as follows (p. 532):

> * * * whether, after the passage of Act No. 124 (the act abolishing the necessity for a certificate of convenience and necessity by a city), the Arkansas Light & Power Company and its successor, the Utilities Company, retained the right to the conditional immunity from competition provided by section 13 of Act No. 571 and which the General Assembly obviously attempted to take away by repealing that section.

The court states that the universal rule is applicable to such cases—

> * * * that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised. *Louisville Bridge Co.* v. *United States,* 242 U. S. 409. Only that which is granted in clear and explicit terms passes by a grant of property, franchise, or privileges in which the government or the public has an interest. *Coosaw Mining Co.* v. *South Carolina,* 144 U. S. 550. "So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not to preclude the city itself from building waterworks of its own. *Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22." (The court then cites a number of Supreme Court cases to the same effect, p. 533. The opinion proceeds:)
>
> The question which confronts us appears to have been answered by the Supreme Court of the United States adversely to the claim of the appellee. In the case of *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, it appears that, by a statute of Oklahoma passed in 1915, cotton gins were declared to be public utilities to be operated under permits from the State Corporation Commission. No gin could be operated

without a license from the Commission and a satisfactory showing of public necessity. In 1925, the Legislature added to the section requiring such a showing this proviso: "Provided, that on the presentation of a petition for the establishment of a gin to be run cooperatively, signed by one hundred citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin." Frost had acquired a license to operate a gin at Durant, Okla. A cooperative gin company made application for a similar license. Frost protested against the granting of such permit. The Commission, at the hearing, held that, although there was no showing of public necessity, it was required, under the proviso, to grant a license. Frost then brought suit to enjoin the issuance of the license upon the ground that the proviso was invalid as contravening the due process and equal protection of the law clauses of the Fourteenth Amendment. The court held that the right to operate a gin and collect tolls therefor, as provided by the Oklahoma statute, was not a mere license, but a franchise and constituted a property right within the protection of the Fourteenth Amendment; that, while the right acquired did not preclude the state from making similar valid grants to others, it was exclusive against any person attempting to operate a competing gin without a permit or under a void permit; and that a suit in

equity by the licensee would lie against an invasion of his rights under the franchise. It was further held that the proviso was invalid as denying to Frost the equal protection of the laws. The court then considered the effect of the invalidity of the proviso upon the substantive provisions of the statute which it qualified, and held that, if the effect of the proviso was to destroy the entire section of the law requiring a showing of public necessity, then Frost would be entitled to no relief, "since, in that event, although the proviso be bad, the inequality created by it would disappear with the fall of the entire statute and no basis for equitable relief would remain." This, it seems to us, is equivalent to saying that if the Legislature had destroyed or repealed the section providing for the limited immunity from competition, Frost could not have maintained his suit, and there would have been no violation of the Fourteenth Amendment and no right which Frost could have protected.

It might, perhaps, be urged that the court was considering only the inequality created by the proviso, and not whether the section of the law providing for a showing of public necessity was a part of Frost's franchise. But that question was involved in the case, since the very purpose of Frost's suit was to protect his franchise, which he contended included the right to conditional immunity from competition. This clearly appears from

the dissenting opinion of Mr. Justice Brandeis, who on page 533 of 278 U. S., says: "Frost claims on another ground that his constitutional rights have been violated. He says that what the statute and the Supreme Court of Oklahoma call a license is in law a franchise; that a franchise is a contract; that where a constitutional question is raised this court must determine for itself what the terms of a contract are; and that this franchise should be construed as conferring the right to the conditional immunity from competition which he claims. None of the cases cited lend support to the contention that the license here issued is a franchise. They hold merely that subordinate political bodies, as well as a Legislature, may grant franchises; and that violations of franchise rights are remediable, whoever the transgressor. Moreover, the limited immunity from competition claimed as an incident of the license was obviously terminable at any moment. Compare *Louisville Bridge Co.* v. *United States,* 242 U. S. 409. It was within the power of the Legislature at any time after the granting of Frost's license, to abrogate the requirement of a certificate of necessity, thus opening the business to the competition of all comers." Mr. Justice Stone, in his dissenting opinion, on page 551 of 278 U. S., says: "Whether the grant appellant has received be called a franchise or a license would seem to be unimportant, for in any case it is not an exclusive privilege. Under

> the Constitution and laws of Oklahoma the Legislature has power to amend or repeal the franchise, Constitution of Oklahoma, art. 9, sec. 47; *Choctaw Cotton Oil Co.* v. *Corporation Commission*, 121 Okla. 51, 247 P. 390; and injury suffered through an indefinite increase in the number of appellant's competitors by nondiscriminatory legislation, would clearly be damnum absequc injuria."
>
> It seems to us, in the light of the decision in the Frost case, that the contention of the appellee here that section 13 of Act No. 571 became perpetually a part of its franchise and contract with the state of Arkansas cannot be sustained, and that it must be held that section 13 constituted nothing more than a barrier erected by the state between the persons who received indeterminate permits under Act No. 571 and those who might wish to compete with them, which barrier the state might raise, lower, or completely remove, provided that this was done through nondiscriminatory legislation.

The plaintiff below relied upon and the District Court adduced in its opinion *Walla Walla* v. *Walla Walla Water Company,* 172 U. S. 1, as authority for the contention that a direct injury will be caused to plaintiff if the performance of the loan and grant agreement is not enjoined. The decision is inapplicable to the controversy here. It there appeared that the City had granted a franchise to the Company whereby the City

agreed not to establish its own water system unless and until a court of competent jurisdiction decided that the Company was not performing its contract. Without any such decision the City proceeded to sell bonds to finance the construction of its own system. The court said there was an impairment of the obligation of the contract. The main contention of the City was that the Fourteenth Amendment did not apply to a City acting in a proprietary and not in a governmental capacity. The court denied this contention.

In the present case it is not claimed by the appellee that it has a contract whereby the City is inhibited from establishing and operating its own system.

Boise Artesian Hot & Cold Water Co. v. *Boise City,* 230 U. S. 84, was also relied upon by the plaintiff below. That case involved the constitutionality under the *contract* clause of the Federal Constitution of an ordinance of the City effecting a franchise for using the City streets for water-supply purposes and the liability of the City for water supplied to it. The suit was one of the Company to recover from the City for water furnished for fire purposes. The defense was that the Company was under a statutory obligation to furnish such water free and that the City was under no legal obligation to pay because there was neither ordinance nor contract for the water claimed to have been furnished. The City alleged by way of counter claim

that the Company was liable for a large sum of money claimed to be due for license fees for the use of the streets. The Company denied the validity of the ordinance imposing the license fees as in violation of its "vested street easement and in contravention of the Constitution of the United States." The Supreme Court reversed the judgment and remanded the case for further proceedings for the error in charging the jury that the ordinance of June 17, 1906, was valid in law and that from the amount found to be due to the Water Company there should be deducted the amount of the counterclaim of the City.

In *Iowa Southern Utilities Company* v. *Cassill,* C. C. A., 8th Circuit, 69 Fed. (2d) 703, the claimed illegality consisted in an illegal exercise of the City's taxing power. The court denied the contention and dismissed the bill.

In *Missouri Public Service Company* v. *City of Concordia* (Mo.), 8 Fed. Supp. 1 (also urged by the plaintiff below and cited by the court), the District Judge denied the defendants' motion to dismiss. The opinion, however, does not show in what way the proposed loan and grant would cause any direct injury to the plaintiff. The court says:

> It would follow that, upon the clear and explicit allegations of the bill in this case, the plaintiff has and enjoys a property right within the city of Concordia, and that such property right is within the protection of the Fourteenth Amendment. If, therefore,

> the defendants are about to act in such manner as to take such property without due process of law, the plaintiff is entitled to the protection of the federal court under constitutional warrant.

The opinion will be searched in vain for anything supporting the court's conclusion that the loan and grant would cause injury to plaintiff. The court cites the *Campbell* case, but, as has been said, that case is authority for the proposition only that if the taxing power is illegally exercised the proposed competition is illegal. Here the claimed illegality is not in the city's action but the financing thereof by a third party.

What the appellee has attempted to do in this case is to enlarge "illegal competition" to include as enjoinable illegality *ultra vires* action of a lender. Restrictions by legal implication on the ability of cities to exercise powers given them by State laws are not favored by the Supreme Court.

In *Puget Sound Light, etc., Company* v. *City of Seattle,* 291 U. S. 619, the Supreme Court denied the asserted right of the plaintiff to require that the City refrain from taxing it where it was a competitor with the City.

In *Joplin (Mo.)* v. *Southwest Missouri Light Company,* 191 U. S. 150, the Supreme Court refused to imply from the company's nonexclusive franchise that the city was precluded from erecting its own lighting plant. The court said:

> The limitation contended for is upon a governmental agency and restraints upon that must not be readily implied * * *. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the power of government. Many cases illustrate this principle (p. 155). (Citing *Skaneatales Waterworks Company* v. *Skaneatales,* 184 U. S. 354; *Bienville Water Supply Company* v. *Mobile,* 175 U. S. 109, 186 U. S. 212.) *Walla Walla* v. *Walla Walla Water Company,* 172 U. S. 1, is not in opposition to these views. * * *

In *Madera Waterworks* v. *Madera* (California), 228 U. S. 454, Mr. Justice Holmes, speaking for the court, denied the contention of the Company that its privilege granted by State law to use the public streets for the purpose of supplying water imported a contract that the corporation constructing the works, as invited, should not be subject to competition from a public source. He said:

> * * * There is no pretense that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class of cases forbid us to resort to the fiction that a promise is implied.
>
> The possibility of such a ruinous competition is recognized in the cases and is held not sufficient to justify the implication of a contract (citing cases). So strictly are pri-

> vate persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not to preclude the city itself from building waterworks of its own. *Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22, 35.

It is true that the foregoing cases were based upon the contention of the utility that a contract existed, whereas here the appellee bases its claim upon "illegal competition." Nevertheless the above citations show it is not the disposition of the court to construct by analogies from the law of fair competition or other analogies limitations on the power of cities to provide and operate their own facilities.

In *High* v. *City of Harrisonville,* 325 Mo. 549, 41 S. W. (2d) 155, adduced by Judge Reeves as authority for his conclusion that the City's plant is "illegal competition" it was conceded that the City had reached the constitutional limit of indebtedness and that the debt created by the contract was within the purview of Section 12, Article X of the Constitution. The court found that the contract required the City to buy its own current and pay for it with funds derived from taxation. It says:

> The record shows the City had no funds available for such purpose. If it purchases, its own current funds for that purpose must come from funds raised by taxation or from a fund which must be replenished from funds raised by taxation (p. 159, S. W. Rep.).

The court below in the opinion says that the plaintiff—

> * * * will, or is in immediate danger of, suffering direct injury by reason of the consummation of the plan by the City with the Government. The bill states that as a franchise holder and taxpayer in the City, the plaintiff has an investment in its system of more than Five Million Dollars in Idaho, and more than Two Hundred Thousand Dollars in the City, and pays Government, State, County, and City taxes in large amounts; that the plan covering the acquiring and construction of the system calls for an expenditure of $337,580.00, which has been approved by the Administrator and the contract already executed by the City for a loan and grant and which exceeds the amount authorized by the ordinance and voters of the City; that such amount would be insufficient to complete the plant and will leave an incomplete and inadequate plant requiring the levying by the City of a large amount in taxes to complete it; that the plan is unsound from an economic standpoint and will not eliminate unfair competitive practices, but will tend to promote unfair and illegal competition which will result in a destruction of its property rights and deprive it of the right to continue furnishing electric light and power to the adjacent cities and territories of Northern Idaho, which are connected with its system in the City of Coeur d'Alene. From these and other facts ap-

> pearing in the bill it would seem that the plaintiff has sufficient amount of interest and will suffer injury by reason of the adoption of the plan and construction of the system, and would as a taxpayer be subjected to the payment of an illegal tax if the loan and grant are unauthorized, to entitle it to question the legality of the plan.

As to the plaintiff's injury by reason of the adoption of the plan and construction of the system and as to plaintiff's alleged injury through the insufficiency of the estimate and the prospective tax to complete the system, the sufficiency of such estimates is a matter for the City officers. This, however, is a local question and is left to counsel for the City.

In *Missouri Utilities Company* v. *City of California, et al.,* 8 Fed. Supp. 454, the learned Judge said on this point (p. 465):

> Taking as true the facts alleged in the bill, it must be conceded that the plaintiff has a valuable property in the city of California, including the right, but not the exclusive right, to sell electric current in that city. It must be conceded that the value of its property will or may be lessened if a competing plant is erected and operated just as the value of an office building may be lessened if another office building is erected to serve the same public. It must be conceded that the city of California has the right, if it proceeds according to law, to build

and operate a municipal light plant, although it will compete with, and may altogether destroy the value of, the plaintiff's plant. Arguendo only, it will be conceded that the United States had no right to make a grant to the city of California to aid it in the erection of its municipal plant.

How can it be said that the United States has taken or will take plaintiff's property by granting money to the city of California for the building of a municipal plant? Clearly it is not the grant which hurts the plaintiff. The plaintiff is injured by the building and operation of the plant, and those are acts of the city of California.

If John D. Rockefeller had given money to California with which to build a plant, would it be said that he had taken plaintiff's property?

If financing the construction of a municipal plant is the taking of the property of a private plant, it is equally so whether the financing is by way of gift or loan. Would anyone contend that every purchaser of a municipal bond whose purchase money goes toward the erection of a municipal plant has taken the property of a privately owned competing plant?

If the plaintiff owned a library in the city of California and made a profit by renting books to the public, and if then Andrew Carnegie gave money to the city for the building of a free library, would Andrew Carnegie have taken plaintiff's property?

> Clearly these questions must be answered in the negative. If the plaintiff will be deprived of its property, it will be deprived of its property by the city of California and not by those, including the United States, who by loan or grant or gift or purchase of bonds have financed the city. So there is no support whatever for the contention that by title 2 of the National Industrial Recovery Act plaintiff has been directly injured through a taking of its property in violation of the Fifth Amendment. Plaintiff, therefore, has no standing on that ground to question the validity of that Act.

Appellee shows no threatened injury to it as a taxpayer

The claim is that the loan and grant being illegal the United States will sue to recover the proceeds thereof and that the appellee will be taxed to pay the judgment. This contention has been disposed of by *City of Allegan* v. *Consumers Power Company,* 71 Fed. (2d) 477, certiorari denied October 8, 1934; *Missouri Utilities Company* v. *City of California, supra; Arkansas Missouri Power Company* v. *City of Kennett, supra.*

Summary

The bill of plaintiff below fails to show that it has capacity to attack the constitutionality of Title II, Sections 202 and 203:

1. There is no causal relation between the loan and grant in aid of an exercise of the city's right to compete and the prospective *damnum.*

2. The loan and grant invade no right of the plaintiff. It has no right to be free of a loan to the city by private lenders or of a gift from private lenders. Neither has it any right to be free of a loan or grant from the Government.

3. The city's action is legally impregnable. Its plan does not include "illegal competition" on its part. No illegal resort to its taxing power is asserted. The only illegality charged is that the loan and grant is *ultra vires* of the United States. This is not an "illegality" within the doctrine of the *Campbell* case or any case following that doctrine.

4. The plaintiff's claim of threatened injury through a prospective assessment on it as a taxpayer to repay the loan and grant is fantastic.

The loan and grant to the city are authorized by title II

Section 202 of Title II of the National Industrial Recovery Act requires the Administrator, under the direction of the President, to prepare a comprehensive program of public works, which shall include, among other things, the following:

> (a) construction * * * of any publicly owned instrumentalities and facilities * * *, (c) any project of the character heretofore constructed or carried on, either directly by public authority or with public aid, to serve the interests of the general public.

The challenged projects are publicly owned instrumentalities and facilities. They are also of the

character "heretofore constructed and carried on directly by public authority."

Section 203 (a) provides:

> With a view to increasing employment quickly (while reasonably securing any loans made by the United States), the President is authorized and empowered, through the Administrator * * * to * * * finance, or aid in the financing, of any public works project included in the program prepared pursuant to Section 202.

Section 203 (a) (2) provides:

> The President is empowered through the Administrator to * * * make grants to states, municipalities, and other public bodies for the construction, repair, or improvement of any such project but no such grant shall be in excess of thirty per centum of the cost of labor and materials employed upon such project.

The said projects have been included in the comprehensive program and the loan and grant authorized by resolution of the Special Board of Public Works, of which the Administrator is Chairman, as stated above.

It appears, therefore, that the loan and grant agreements challenged are authorized by the Act by the executive officers duly authorized by Congress to enter into and to perform them.

Title II, sections 202 and 203, is a constitutional enactment

Article I, Section 8, of the Constitution empowers Congress to lay and collect taxes to pay the debts and provide for the general welfare of the United States (Clause 1), to borrow money on the credit of the United States (Clause 2), to make all laws which shall be necessary and proper for carrying into execution the powers conferred in Section 8, and all other powers vested by the Constitution in the Government of the United States or in any department or officer thereof (Clause 18). Article IV, Section 3, empowers Congress to dispose of property of the United States.

Title II of the Recovery Act, approved June 16, 1933, is a constitutional exercise of the said powers. Sections 211 to 219 lay taxes or amend revenue acts. Section 210 authorizes the Secretary of the Treasury to borrow such amounts as may be necessary to meet the expenditure authorized by said Act. Sections 202, 203, and 208 state what expenditures (among others) are so authorized. They are the expenditures of the agency created to effectuate the purposes of Title II, to wit, the Federal Emergency Administration of Public Works (Section 201); the expenditures of the agency necessary to effectuate the purposes of Title I, the National Recovery Administration (Title I, Section 2); those necessary to effectuate oil regulation (Section 9); those necessary in connection

with the preparation of the comprehensive program of public works (Section 202); those necessary in order, "with a view to increasing employment quickly", to finance or aid in the financing of any public works project included in the comprehensive program, including a grant to "public bodies" of not to exceed 30% of the cost of labor and materials employed upon such project (Section 203); grants aggregating $400,000,000 to highway departments of the several states (Section 204); allotment of not less than $50,000,000 for national forest highways, etc. (Section 205); making available $25,000,000 to the President for making loans for and otherwise aiding in the purchase of subsistence homesteads (Section 208).

Section 220 authorizes to be appropriated out of any money in the treasury not otherwise appropriated the sum of $3,300,000,000.

The Fourth Deficiency Act, fiscal year 1933 (Public No. 77, 73d Congress), under the heading "Executive Office and Independent Establishments," provides:

> For the purpose of carrying into effect the provisions of the Act entitled (National Industrial Recovery Act, approved June 16, 1933) and also for the purpose of an act for the relief of unemployment, approved March 31, 1933, and for each and every object thereof, to be expended in the discretion of the President, to be immediately available, and, except as heretofore provided, to

> remain available until June 30, 1935, $3,300,000,000.

The Emergency Appropriation Act approved June 19, 1934, Title II, "Emergency Appropriations—Executive" provides:

> For an additional amount for carrying out the purposes of the Act entitled (the Act approved March 31, 1933, for the relief of unemployment); the Federal Emergency Relief Act of 1933, approved May 12, 1933 * * *; The Tennessee Valley Authority Act of 1933, approved May 18, 1933 * * *; and the National Industrial Recovery Act, approved June 16, 1933 * * *; $899,675,000 to be allocated by the President for further carrying out the purposes of the aforesaid Acts and to remain available until June 30, 1935 * * *.

The title of the National Industrial Recovery Act is "An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes."

Title I, Section 1, provides ("Declaration of Policy"):

> A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy

> of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

Title II is entitled "Public Works and Construction Projects—Federal Emergency Administration of Public Works." Title II of the Recovery Act is thus an act levying taxes, authorizing an appropriation, prescribing purposes for which expenditures are authorized, and empowering the creation of an agency by the President to effectuate the purposes of the act.

Pursuant to this authority, the President has established the Federal Emergency Administration of Public Works (Executive Orders No. 6174, June 16, 1933; No. 6198, July 8, 1933; No. 6252, August 19, 1933; and No. 6929, December 21, 1934).

In Title II of the Recovery Act Congress found and declared the following (among others) to be national purposes:

(a) The preparation of a comprehensive program of public works to include non-Federal as well as Federal projects. This program is to include not only the continental United States, but Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

(b) The quick increase of employment by means of Federal construction or Federal aid in financing the construction of projects included in the comprehensive program.

(c) The promotion of the thirty-hour week and consequent spreading of employment.

(d) Increasing purchasing power by requiring the payment of just and reasonable wages.

(e) Preference for veterans in the employment of labor on P. W. A. projects.

National purposes are further declared by Section 1 of Title I—"* * * to promote the fullest possible utilization of the present productive capacity of industries, to increase the consumption of industrial and agricultural products by increasing purchasing power * * * to rehabilitate industry and to conserve natural resources."

The means which Congress has adopted to effectuate the said purposes are, among others, by authorizing the Executive to allot Federal funds to Federal agencies to finance construction of such public works as he deems worthy of inclu-

sion in the comprehensive program and to make loans and grants to States and public bodies to finance the construction, repair or improvements of such of their public works as he deems worthy of such inclusion and in his judgment promote the declared national purposes.

Title II, Sections 202 and 203, is not legislation prescribing rules of conduct for the people of the United States, or for any of them, but authority to the Executive to expend on prescribed conditions the appropriation authorized for the primary purpose of providing employment on a national scale.

Under the power to lay and collect taxes to provide for the common defense and general welfare of the United States, to borrow money on the credit of the United States (and by necessary implication to expend the moneys collected from taxes or borrowed) to dispose of the property of the United States, and to make all laws which are necessary and proper for carrying into execution the powers expressly conferred upon Congress, Congress may declare and has continuously, since the foundation of the Government, declared certain purposes national and promotive of the general welfare of the United States and has appropriated Federal funds and property to further them.

An extensive and detailed enumeration and discussion of the exercise of this power of Congress

appears in an article by Edward S. Corwin, entitled "The Spending Power of Congress—apropos the Maternity Act", *36 H. L. P.* p. 548. The more prominent instances in which Congress has levied taxes and made appropriations or disposed of property of the United States to promote purposes deemed by it national although not within subject matters, which the Constitution specifically authorizes Congress to regulate are:

1. *Federal grants to States in aid of education.*—There is no express clause of the Constitution authorizing such grants unless it be the power to dispose of the property of the United States. Nor is Congress empowered to *regulate* education. Among the early instances of the exercise of the power of Congress to appropriate money and to dispose of national property for the general welfare of the United States is the Act admitting Ohio into the Union, by which in return for a grant of lands to each township for free schools, and other concessions, Ohio was required not to tax public lands sold within its borders for five years after sale. Here Congress granted national lands to provide free schools. The Act of July 2, 1862 (12 Stat. 503), granted Federal Public lands to the States in return for their pledge to establish colleges. In 1890 Congress made donations to each State and territory for the more complete endowment and maintenance of colleges for the benefit of agriculture (26 Stat. 417). These donations were derived

from the proceeds of sales of Federal public lands. In 1900 Congress began to make appropriations from general funds for aid of education in the States. By the Smith-Lever Act of 1914 (38 Stat. 372) Congress began the policy of making appropriations for the promotion of agricultural extension work in the States and territories. This Act requires the matching of the appropriations made by the States. The Smith-Hughes Act of 1917 (39 Stat. 929) authorizes appropriations later amounting to about $7,000,000 per annum to the States to aid them in the paying of salaries and the training of teachers of agricultural and industrial subjects and of home economics. The Act of 1920 authorizes the appropriation after 1921 of $1,000,000 annually in cooperation with the States in the vocational rehabilitation of persons disabled in industry (41 Stat. 715). The Act of March 3, 1879 (20 Stat. 468), and June 25, 1906 (34 Stat. 460), appropriated large sums to the American Printing School for the Blind at Louisville, Kentucky.

2. *Grants in aid of safeguarding maternity.*— Professor Corwin's article was specifically directed to the Maternity Act of November 23, 1921 (42 Stat. 224), which provides for an appropriation during a term of years of certain sums to be expended under the direction of the Children's Bureau of the Department of Labor in cooperation with certain State agencies for the purpose of reducing the mortality of women and children in con-

nection with birth. The Supreme Court, in separate actions brought by the State of Massachusetts and by a Federal taxpayer of that State, refused to declare the Maternity Act unconstitutional (*Massachusetts* v. *Mellon,* 262 U. S. 447; *Frothingham* v. *Mellon,* 262 U. S. 447).

3. *Appropriations to finance banks and fiscal operations.*—Although the Constitution grants no express power to Congress to create banks, this authority was implied by Chief Justice Marshall from the fiscal powers granted to Congress (*McCulloch* v. *Maryland,* 4 Wheat. 316). Although Congress has no express power to establish financial institutions to lend money on farm mortgages, such authority was implied from the power to borrow, where institutions set up were empowered to act as fiscal agents and as depositaries of public moneys, even though such powers had not been used and it was obvious that it was not the primary intention of Congress that the institutions should be utilized for such purposes (*Smith* v. *Kansas City Title and Trust Co.,* 255 U. S. 180). The case just cited involved the constitutionality of the Federal Farm Loan Act (39 Stat. 360). Mr. Charles E. Hughes, now Chief Justice Hughes, appeared for the Federal Land Bank of Wichita, Kansas. He based his case for the validity of the Act on the following propositions:

> I. Congress has power to use the public money and to provide for the borrowing of

money, to aid in agricultural development throughout the country in accordance with the systematic and general plan to promote the cultivation of the soil, involving the application of money through loans or otherwise, and that Congress, having this power, could exercise it by the adoption of appropriate means to that end and the creation of instrumentalities for that purpose.

II. Congress has the power to judge for itself what fiscal agencies the Government needs and that its decision of that question is not open to judicial review; that Congress may create in its discretion, as it has created in this instance, moneyed institutions equipped to serve as fiscal agents of the Government and to provide a market, as stated in the Act, for United States bonds.

Mr. Justice Day, speaking for the court, said (p. 208):

> Since the decision of the great cases of *McCulloch* v. *Maryland,* 4 Wheat. 316, and *Osborn* v. *Bank,* 9 Wheat. 738, it is no longer an open question that Congress can establish banks for national purposes * * *. While the express power to create a bank or incorporate one is not found in the Constitution, the court, speaking by Chief Justice Marshall, found authority so to do in the broad general powers conferred by the Constitution upon the Congress to lay and collect taxes, to borrow money, to regulate commerce, to pay the public debts, to declare and conduct war, to raise and support

> armies, to provide and maintain a navy, etc. * * * In *First National Bank* v. *Union Trust Co.,* 244 U. S. 416, 419, the Chief Justice, speaking for the court, after reviewing *McCulloch* v. *Maryland* and *Osborn* v. *Bank,* and considering the power given to Congress to pass laws to make the specific powers granted effectual, said: "In them it was pointed out that this broad authority was not stereotyped as of any particular time, but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet any situation which it was deemed required to be provided for."

Title II of the Recovery Act establishing P. W. A. may be related to the same powers as support Congress in establishing farm loan and other banks for national purposes. P. W. A. is in certain aspects also a fiscal institution of the Government, lending and granting national moneys to finance the construction of public works throughout the nation. It buys and sells bonds of States and of their subdivisions (Section 203). The bonds purchased, if retained, support the credit of the United States, and if sold their proceeds become available for further fiscal operations.

4. *Reclamation Acts.*—The Reclamation Acts, beginning in 1902, authorize advances of Federal

funds without interest to irrigation districts established by State law. (See 32 Stat. 388.) Many of these acts provide for the generation and sale of electric power by the districts. (See 34 Stat. 117.) These acts have been sustained under the power of Congress to dispose of property belonging to the United States, *U. S.* v. *Hanson,* 167 Fed. 881; *Burley* v. *U. S.,* 179 Fed. 1.

Arizona v. *California,* 283 U. S. 423, sustained the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), whereby the United States became a party to a contract with seven States and Congress appropriated $165,000,000 to finance the construction of Boulder Dam, including hydroelectric works, authorized the sale of electric current to reimburse the Government, and required operation by the United States. The act was challenged on the ground that it was not an exercise of any power delegated to Congress. While the act was not attacked specifically on the ground that the United States was without power to generate and sell electrical energy in connection with a project improving navigation and providing flood control, the plaintiff's attack was broad enough to include that challenge. The bill was ordered dismissed. The provisions of the act requiring reimbursement through the sale of electrical energy were essential to the legislation and in dismissing the bill the court sustained the constitutionality of the exercise of the power

of the United States to generate and sell electricity under the circumstances stated. The court points out, page 456, that:

> The fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred even if those other purposes would not alone have justified exercise of Congressional power.

Citing *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548; *Kaukauna Water Power Co.* v. *Green Bay etc. Co.,* 142 U. S. 254, 275; *In re Kollock,* 165 U. S. 526, 536; *Weber* v. *Freed,* 239 U. S. 325, 329; *U. S.* v. *Doremus,* 249 U. S. 86, 93. So here the fact that the establishment of the plant of the defendant City may accomplish a reduction of rates cannot invalidate the authority of the Executive, pursuant to an Act of Congress, to purchase bonds, although the National Government has no jurisdiction to legislate on the rates of a municipal enterprise.

Appropriations to finance the Red Cross.—The power of Congress to appropriate and dispose of money and national property for purposes promotive of what it deems the general welfare further appears by its Joint Resolutions and Acts with regard to the Red Cross. Large sums and property of great value have been so appropriated and disposed of in times of peace as well as during a state of war. For example: Joint Resolutions of March 7, 1932, 72d Congress, 1st Session (Chap. 72, U. S.

Stat. at Large, Vol. 47, Part 1, p. 61) authorizing the distribution of Government-owned wheat through the American National Red Cross and other organizations for relief of distress; the resolution of July 5, 1932 (Stat. at Large, Vol. 47, Part 1, p. 605), authorizing the distribution of Government owned wheat and cotton to the American National Red Cross and other organizations for the relief of distress; joint resolution of July 22, 1932, making appropriations to enable the Federal Farm Board to distribute Government owned wheat and cotton to the American National Red Cross, etc. (appropriations of $40,000,000, Stat. at Large, Vol. 47, p. 741) and the act of February 8, 1933 (Stat. at Large, Vol. 47, Part 1, p. 797), authorizing the distribution of Government owned cotton to the Red Cross.

Further instances of the exercise of the power discussion are: the appropriation in 1838 for the collection of agricultural statistics and other agricultural purposes; in 1852 for the purchase and distribution of seeds; in 1850 there was an appropriation for the chemical analysis of vegetable substances. In 1862 the Department of Agriculture was established and in the following year $80,000 was appropriated to it for the study of plant and animal diseases and insect pests, culture of tobacco, silk and cotton, irrigation, the adulteration of foods and the like.

The loan and grant challenged is in aid of a public use so declared by the State. Practically all the

States authorize municipal competition with private corporations in the field at least of water and electricity. In *Green* v. *Frazier* (Governor of North Dakota) 253 U. S. 233, the court sustained the acts of North Dakota placing the State in the business of manufacturing and marketing farm products, providing homes for the people and creating a state banking system. The court said, p. 240:

> Questions of policy are not submitted to judicial determination and the courts have no general authority of supervision over the exercises of discretion which under our system is reposed in the people or other department of government.

The court further said:

> What was or was not a public use was a question concerning which local authority, legislative and judicial, had a special means of securing information to enable them to form a judgment, and particularly that the judgment of the highest court of the State declaring a given use to be public in its nature would be accepted by this court unless clearly unfounded (p. 242).

What is or is not a public use is thus a matter for State determination. If the use is public the taxing power of the State or cities may be utilized to accomplish it, whether or not the use challenged places public bodies in competition with private enterprises is immaterial.

In many of the instances specified the power has been exercised although the effect of the appropriation might be to injure existing enterprises. Appropriations in aid of free State education doubtless affected injuriously private educational institutions for profit. The free distribution of seeds and much of the work of the Department of Agriculture infringed upon the market of private enterprise. Distribution through the Red Cross of wheat, etc., trespassed upon the market of corporations engaged in the sale of grain.

Education is not a subject-matter which the Constitution authorizes Congress to regulate. However, since the Act admitting Ohio to the Union (1802), Congress has made extensive appropriations of lands and of money to the States and to subdivisions of the States. The constitutionality of these appropriations seems never to have been questioned, but, on the other hand, has been, by implication, repeatedly assumed, for the provisions of the statutes have been interpreted and applied by the Supreme Court in a very large number of cases (*Campbell* v. *Doe* (1851), 13 Howard 204; *Haire* v. *Rice* (1907), 204 U. S. 291; *California* v. *Desert, etc., Co.* (1917), 243 U. S. 415).

In *Wyoming* v. *Irvine* (1907), 206 U. S. 278, the Morrill Act (July 2, 1862, 12 Stat. 503), the first nation-wide appropriation of land to the purposes of education was interpreted by the Supreme Court without any suggestion that its constitutionality was questionable.

The power challenged here rests upon Article I, section 8, clause 1, clause 18, upon the aggregate of the powers conferred in section 8 and upon Article IV, clause 3, section 2, by which Congress has power to dispose of the property of the United States. That property includes money is not disputable.

Story, in his work on the Constitution, Vol. 2, secs. 907–988, advances the same views as to the powers of the Congress to appropriate money for the general welfare of the United States as were entertained by Hamilton, Monroe, and Jackson. In section 909 he says:

> An attempt has been sometimes made to treat this clause as distinct and independent and yet as having no real significancy per se, but (if it may be so said) as a mere prelude to the succeeding enumerated powers. It is not improbable that this mode of explanation has been suggested by the fact that, in the revised draft of the Constitution in the convention, the clause was separated from the preceding exactly in the same manner as every succeeding clause was, viz, by a semicolon and a break in the paragraph; and that it now stands, in some copies, and it is said that it stands in the official copy, with a semicolon interposed. But this circumstance will be found of very little weight, when the origin of the clause and its progress to its present state are traced in the proceedings of the convention. It will then appear that

> it was first introduced as an appendage to the power to lay taxes. But there is a fundamental objection to the interpretation thus attempted to be maintained, which is, that it robs the clause of all efficacy and meaning. No person has the right to assume that any part of the Constitution is useless or is without a meaning; and a fortiori no person has a right to rob any part of a meaning, natural and appropriate to the language in the connection in which it stands. Now, the words have such a natural and appropriate meaning, as a qualification of the preceding clause to lay taxes. When, then, should such a meaning be rejected?

Again, at section 914, in discussing the clause under consideration, he says:

> It is, on its face, a distinct, substantive and independent power. Who, then, is at liberty to say, that it is to be limited by other clauses, rather than they to be enlarged by it; since there is no avowed connection, or reference from the one to the others? Interpretation would here desert its proper office, that which requires that every part of the expression ought, if possible, to be allowed some meaning, and be made to conspire to some common end.

In discussing the contention at that time advanced by some, that the grant to lay taxes and make appropriations for the general welfare was limited to the specific objects enumerated in section 8 of Article I, he says, in section 916:

Stripped of the ingenious texture by which this argument is disguised, it is neither more nor less than an attempt to obliterate from the Constitution the whole clause, "to pay the debts and provide for the common defense and general welfare of the United States", as senseless or inexpressive of any intention whatsoever. Strike them out, and the Constitution is exactly what the argument contends for. It is, therefore, an argument that the words ought not to be in the Constitution; because if they are, and have any meaning, they enlarge it beyond the scope of certain other enumerated powers, and this is both mischievous and dangerous. Being in the Constitution, they are deemed to be *vox et preterea nihil,* an empty sound and vain phraseology, a fingerboard pointing to other powers but having no use whatsoever, since these powers are sufficiently apparent without. Now, it is too much to say that in a constitution of government, framed and adopted by the people, it is not a most unjustifiable latitude of interpretation to deny effect to any clause, if it is sensible, in the language in which it is expressed, and in the place in which it stands. If words are inserted, we are bound to presume that they have some definite object and intent, and to reason them out of the Constitution upon arguments ab inconvenienti (which to one mind may appear wholly unfounded and to another wholly satisfactory) is to make a new Constitution, not to construe the old one. It is to do the very

> thing, which is so often complained of, to make a Constitution to suit our own notions and wishes, and not to administer or construe that which the people have given to the country.

Again, at section 919, he says:

> A power to lay taxes for any purposes whatsoever is a general power; a power to lay taxes for certain specified powers is a limited power. A power to lay taxes for the common defense and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them. If the defense proposed by a tax be not the common defense of theUnited States, if the welfare be not general, but special or local, as contradistinguished from national, it is not within the scope of the Constitution.

Mr. Pomeroy, in his work on Constitutional Law, third edition, sections 274 and 275, in discussing the power conferred upon the Congress by the paragraph under consideration, said:

> 274. The subsection should, therefore, be understood as though it read, "taxes may be laid and collected in order to pay debts and provide for the common defense and general welfare." Thus, the Congress does not possess an absolutely unlimited power of taxation. It cannot resort to this high attribute for one or more of three purposes, payment of debts, the common defense, the

general welfare. The defense must be common and the welfare general. But, after all, this leaves a sufficiently wide field for legislative operations. Money may be raised to pay any debts, however contracted, whether now existing or to become due at a future time. Common defense and general welfare are terms of the broadest generality, and within them can be easily included all the objects for which governments may legitimately provide.

275. What measures, what expenditures will promote the common defense or the general welfare, Congress can alone decide, and its decision is final. It is certainly not necessary that any particular expenditure should be spread over the whole country, to bring it within the meaning of a defense which shall be common, or a welfare which shall be general. All the disbursements of the government must be met by revenue of some kind, and must finally be paid by some species of taxation, except that small portion which may be provided for by the sale of public property. Congress expends vast sums of money in the erection and adornment of a capitol, in furnishing a library, in the purchase of pictures, statues, and busts, in endowing a scientific institution; but it is not claimed that these disbursements are not made for the general welfare. A fort in New York is for the common, not local, defense. In short, the legislature is not trammeled by

> these provisions; it has ample scope and verge in which to indulge its proclivities to raise and expend money.

If any additional authority were needed on the right of the Congress to appropriate money for the general welfare of the United States, it may be found in the unbroken and continuous practice of the Congress since the very beginning of our government. Hundreds of acts have been passed by the Congress appropriating money for which no other authority can be found than that granted by the general welfare clause of the Constitution, and, so far as we are advised, none of these acts has ever been held unconstitutional by the Supreme Court. Mr. Justice Story, in his work on Constitutional Law, vol. 2, 3d edition, 1833, section 988, in discussing the interpretation which had been placed upon the general welfare clause of the Constitution by the Congress, says:

> In regard to the practice of the government, it has been entirely in conformity to the principles here laid down. Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad, or their narrow sense, and in an especial manner appropriations have been made to aid internal improvements of various sorts in our roads, our navigations, our streams, and other objects of a national character and importance. In some cases, not silently, but

upon discussion, Congress has gone the length of making appropriations to aid destitute foreigners and cities laboring under severe calamities; as in the relief of the St. Domingo refugees in 1794, and the citizens of Venezuela who suffered from an earthquake in 1812. An illustration equally forcible of a domestic character, is the bounty given in the cod fisheries, which was strenuously resisted on constitutional grounds in 1792; but which still maintains its place in the statute book of the United States.

Cooley, in his work on Constitutional Limitations, 7th edition, page 102, in discussing the force to be given to contemporaneous and practical construction of constitutional provisions, says:

> But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially where this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duty, and rights have

> accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the argument ab inconvenienti is sometimes allowed to have great weight.

More than once the Supreme Court has recognized the soundness of the rule laid down by Judge Cooley. In the case of *Stuart* v. *Laird,* 1 Cranch. 299, the Court sustained the right of its members to sit as circuit judges on the ground of practical constitution. The Court said:

> Another reason for reversal is, that the judges of the Supreme Court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible character. This practical exposition is too strong and obstinate to be shaken or controlled.

In the case of *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 351, the Court in holding that the appellate jurisdiction of the Supreme Court extends to a final judgment or decree in any suit in the highest court of a State in the cases enumerated in the 25th section of the Judiciary Act gave as one

of the reasons for its conclusions the practical construction which had been given both to the Constitution and the Judiciary Act. The Court said:

> Strong as this conclusion stands upon the general language of the Constitution, it may derive support from other sources. It is an historical fact that this exposition of the Constitution, extending its appellate power to State courts, was previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings both in and out of the State conventions. It is an historical fact that at the time when the judiciary act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact that the Supreme Court of United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States of the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence

> of enlightened state courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over the subject to perpetual and irremedial doubts.

In the case of *Cohens* v. *Virginia,* 6 Wheat. 264, 418, the Supreme Court by Chief Justice Marshall, in a case involving the same question as that involved in *Martin* v. *Hunter's Lessee,* placed great stress upon practical and contemporaneous construction.

In the case of *Bank of United States* v. *Halstead,* 10 Wheat. 51, the Court was called upon to decide whether the laws of the United States authorizing the courts of the Union to so alter the form of process of execution used in the Supreme Courts of the States in September 1789, as to subject to execution lands and other property not so subject by the state laws in force at that time, were constitutional. The Court held that these laws were constitutional, and gave as one of the reasons for so holding the practical construction which had been given to them by the courts. The Court said:

> And if any doubt existed whether the act of 1792 vests such power in the courts, or with respect to its constitutionality, the practical construction heretofore given to it ought to have great weight in determin-

> ing both questions. It is understood that it has been the general, if not the universal, practice of the courts in the United States so to alter their executions as to authorize a levy upon whatever property is made subject to the like process from the state courts; and under such alteration many sales of land have no doubt been made which might be disturbed if a contrary construction construction should be adopted.

In the case of *Ogden* v. *Saunders,* 12 Wheat. 290, Mr. Justice Johnson, in discussing the weight which should be given a contemporaneous exposition of the Constitution, said:

> Every candid mind will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption that the cotemporaries of the Constitution have claims to our deference on the question of right because they have the best opportunities of informing themselves of the understanding of the framers of the Constitution and of the sense put upon it by the people when it was adopted by them.

In the case of *McCulloch* v. *Maryland,* 4 Wheat. 316, Chief Justice Marshall, in discussing the weight which should be given to the practical construction of the Constitution by the courts, said:

> The first question made in the cause is, has Congress power to incorporate a bank? It has been truly said that this can scarcely be considered as an open question, entirely

> unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. It will not be denied that a bold and daring usurpation might be resisted after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the Constitution deliberately established by legislative acts on the faith of which an immense property has been advanced ought not to be lightly disregarded.

In the case of *Field* v. *Clark,* 143 U. S. 649, Mr. Justice Harlan, in discussing the weight to be given by courts to practical construction of constitutional provisions, said:

> The practical construction of the Constitution as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be over-

> ruled unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land.

The power to dispose of property belonging to the United States is vested in Congress without limitation. In *United States* v. *Gratiot,* 14 Peters, 526, 537, 538, the Court said:

> The term territory as here used (the territory or other property belonging to the United States) is merely descriptive of one kind of property and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation. * * * The disposal must be left to the discretion of Congress.

In *Gibson* v. *Chouteau,* 13 Wall. 92, 99, the Court said as to the power of disposition of the public domain:

> That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made.

The term "property" as the Court pointed out in *Dred Scott* v. *Sandford,* 19 How. 393, 436 (see also *Mormon Church* v. *United States,* 136 U. S. 1, 64), includes personal property. Later decisions show that it includes money from whatever source

derived. *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S. 438, 443; *Bush* v. *Elliott,* 202 U. S. 477, 481.

The grant of power to appropriate which is contained in the general welfare provision is in no wise restricted to the subject matters upon which Congress may make regulations.

Congress would have had ample authority to make the appropriation and to give the directions for their expenditure contained in Secs. 202, 203 even if it had not been given by Article IV general authority to dispose of the resources of the Government, but had been given only the authority contained in Article I, section 8 to collect taxes to pay the debts and to provide for the general welfare and common defense of the United States.

This clause does not empower Congress to provide for the general welfare otherwise than through appropriations, for the entire clause relates to taxation and to the use of the funds raised by taxation.

However, the clause does not restrict appropriations to the subject matters upon which Congress may legislate. As to such subject matters it would have been unnecessary to specifically authorize appropriations, for the final clause in this section empowers Congress—"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Even without the general welfare provision, Congress could, whenever it has authority to impose its will by positive commands, appropriate the money

necessary to make its will effective. The clause authorizing Congress by appropriations to provide for the general welfare must therefore have a broader purpose than merely to facilitate the exercise of the powers of Congress to impose commands.

Moreover, the grant of power to tax and appropriate in the first clause of section 8 is distinct from the grants of power in each of the other sixteen clauses of that section, and there is nothing in the sweeping term "to provide for * * * the general welfare" to show that the power to appropriate money was given merely in aid of the grants in those other clauses.

As pointed out in Story on the Constitution, 5th edition, sec. 913:

> It is not said, to "provide for the common defense and general welfare, in manner following, viz", which would be the natural expression to indicate such an intention. But it (the clause) stands entirely disconnected from every subsequent clause, both in sense and punctuation, and is no more a part of them than they are of the power to lay taxes.

Story further says, sec. 991:

> In regard to the practice of the government, it has been entirely in conformity to the principles here laid down. Appropriations have never been limited by Congress to cases falling within the specific powers enumerated in the Constitution, whether those powers be construed in their broad or their narrow sense.

In secs. 923, 924, he says:

> But then, it is said, if Congress may lay taxes for the common defense and general welfare, the money may be appropriated for those purposes, although not within the scope of any other enumerated powers. Certainly, it may be so appropriated; for if Congress is authorized to lay taxes for such purposes, it would be strange if, when raised, the money could not be applied to them. That would be to give a power for a certain end, and then deny the end intended by the power. * * *
>
> If there are no other cases which concern the common defense and general welfare, except those within the scope of the other enumerated powers, the discussion is merely nominal and frivolous. If there are such cases, who is at liberty to say that, being for the common defense and general welfare, the Constitution did not intend to embrace them?

Hare, American Constitutional Law, 245, 246, says concerning President Monroe's message (Richardson Messages and Papers of the Presidents, Vol. 2, pp. 142, 144, 166 et seq.):

> This recantation was * * * a virtual adoption of the Hamiltonian theory that the power of Congress over the Treasury is in effect absolute, and extends to the appropriation of money for any object which in their judgment will conduce to the defense of the country or promote its wel-

> fare. * * * Such in fact has been the practice since the Government went into operation; and the right can hardly be disputed in the face of a usage which will soon extend through an entire century. In the greater number of the instances above referred to, the Government did not act in its sovereign capacity, but like a rich and public-spirited individual who draws his purse strings for the common good.

Willoughby on the Constitution, sec. 269, declares:

> The doctrine has become an established one that Congress may appropriate money in aid of matters which the Federal Government is not constitutionally able to administer and regulate.

Burdick on the Constitution, sec. 77, takes a similar position.

The constitution of any nation is practically what is has become of the practical construction of those in authority, acquiesced in by the people (Note by Cooley to Story on the Constitution, sec. 311). *United States* v. *Midwest Oil Co.,* 236 U. S. 459, 472, 473, and cases cited. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 352. *McCulloch* v. *Maryland,* 4 Wheat. 316, 401. *Field* v. *Clark,* 143 U. S. 649, 691. *Downes* v. *Bidwell,* 182 U. S. 244, 286. *Ogden* v. *Saunders,* 12 Wheat. 212, 290.

One of the first acts of the First Congress was to grant bounties on exports of salted and dried fish

(Act of July 4, 1789, 1 Stat. 27). Later bounties were provided by the Act of August 10, 1790 (1 Stat. 182). The Act of February 16, 1792, provided a bounty on the cod fisheries (2 Stat. 229). Another bounty was allowed by the Act of July 29, 1813 (3 Stat. 49). Bounties to fishermen: Acts of June 26, 1834, (6 Stat. 569), June 30, 1834 (6 Stat. 578).

Congress has repeatedly appropriated money to aid sufferers from calamities in foreign countries (2 Stat. 730; 3 Stat. 561; 9 Stat. 207; 16 Stat. 597; 21 Stat. 303; 38 Stat. 238; 38 Stat. 776; 42 Stat. 351, $20,000,000 for grain for Russia).

By the Act of June 15, 1860 (12 Stat. 117), Congress made an appropriation to observe an eclipse of the sun. It has given large sums for expositions at London (Act of June 1, 1872, 17 Stat. 203), at Philadelphia (Act of February 16, 1876, 19 Stat. 3), Paris (Act of May 10, 1888, 25 Stat. 621), Chicago (Act of August 5, 1892, 27 Stat. 389), St. Louis (Act of March 3, 1901, 31 Stat. 1444), Jamestown (Act of March 5, 1905, 33 Stat. 1047), San Francisco (Act of June 23, 1913, 38 Stat. 77), Rio de Janeiro (Act of November 2, 1921, 42 Stat. 210), and Pilgrims Tercentenary (Act of May 13, 1920, 41 Stat. 598).

It would seem that if Congress may constitutionally provide for the diverse purposes exhibited in many hundreds of instances, for education, agricultural benefits, fisheries, encouragement of manu-

factures, health of mothers, the relief of destitution here and abroad, it may also provide means to enlarge opportunities of employment in a crisis arising from the partial cessation of industry whereby at least 10,000,000 workers usually employed are without means of maintaining themselves or their families and of making the purchases necessary for the functioning of the economic system.

The foregoing examples of exercise of the power of Congress to appropriate money and property for purposes it deems promotive of the national well-being relate to social enterprises not for profit conducted by public authority. Instances of Federal aid to enterprises for profit are legion. No express provision in the Constitution authorizes Congress to impose duties on imported goods other than for revenue. Many tariff acts, particularly of late years, disregarded revenue and provide protection in aid of private industry. Public lands equal in area to the smaller European States have been granted to railroads. This may possibly be in connection with the power to establish post offices and post roads and certainly with the power to dispose of the property of the United States (Article III, Section 4). Loans to corporations engaged in marine transportation have been frequent in late years, and steamship companies operating throughout the globe have been heavily subsidized through contracts for carrying the mails. Perhaps such subsidies may be connected with the power to

establish post offices, but the power of Congress to dispose of property of the United States by making loans and grants to cities is certainly as well established as its power to apply Federal funds to subsidize foreign commerce. Regulation of commerce is authorized, but subsidizing foreign commerce might be said to be somewhat remote from the power specifically granted. The National Government has also subsidized corporations engaged in air transportation and to the competitive disadvantage of transportation by land. The entrance by the United States into the business of transportation by the Parcel Post Act impinged upon that of the express companies, but here it is fairly clear that the power exercised is expressly granted. It is cited to show that the National Government has not hesitated to embark upon enterprises competitive with private enterprises. Furthermore, the encouragement of useful public works may be related to the power of Congress to provide for the common defense. The enlargement of the generating capacity of electrical energy certainly promotes the national defense. It is recognized by the leaders of the electrical industry that generating capacity, particularly since the depression, has not kept pace with the necessities of the country (Electrical World, Vol. 104, No. 9, p. 21, 1934). Under conditions of modern warfare metallurgy, the fabrication of steel, aluminum, and other metals by electrical energy is indispensable for successful war-

fare. The project challenged adds to generating capacity, and also provides a future market for the current generated by Grand Coulee and will aid ultimately in amortizing the cost thereof.

In Title II of the National Industrial Recovery Act, Congress found and declared that the preparation of a "comprehensive program of public works" is a national purpose and promotive of the general welfare. It was the apparent purpose and policy of Congress to abandon the haphazard and unrelated construction of Federal public works through the nation, and by the inducement of loans and grants to states and their subdivisions to bring Federal and non-Federal public works into interrelation. It further appears from Section 202 of the Recovery Act that it was the purpose of Congress to arrest the impairment of the national home of the people of the United States through the destruction of forests, the pollution of rivers, the erosion of lands and otherwise, by means of appropriations in aid of projects having the effect of improving and protecting natural resources. That natural resources, particularly rivers, forests, and lands, have been injured by lack of regional or centralized control is undeniable. Neither water nor electric energy have any respect for State boundaries. Congress therefore authorized the inclusion in the comprehensive program not only of Federal public works but of municipal improvements with a view to bringing them in such relation with each

other as to prevent interference by one project with others and to promote an orderly and intelligent construction of public works and development of natural resources within the continental United States and even the outlying possessions.

In modern life electrical energy is almost as necessary as water. Congress, knowing that the laws of the several States authorize municipalities to construct and operate electric systems, directed the inclusion of projects for the construction, repair, and improvement of such systems in the comprehensive program and their financing by loans and grant, all with a view to empowering the President to bring facilities for producing and providing the people with electrical energy into the comprehensive national program.

In the entire history of the nation not a single Act of Congress appropriating money to provide for the general welfare or for purposes found by Congress to be national has been held unconstitutional by the Supreme Court. There are, indeed, few instances in which the power of Congress in this regard has even been challenged. In *U. S.* v. *Gettysburg Railway Company,* 160 U. S. 668, the question before the Supreme Court was whether the Federal Government had the power to condemn the land on which the Battle of Gettysburg was fought for the purpose of laying out a national park, erecting suitable tablets, preserving the battle site from being defaced by defendant's railroad, marking the positions of the various com-

mands in the battle, etc. The Supreme Court sustained the power of condemnation. The Court said that such power resulted from the power of taxation to be exercised for the common defense and the general welfare, and that the use to which the condemned land was to be put was one so closely connected with the general welfare of the nation as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country.

In *U. S.* v. *Realty Company,* 163 U. S. 427, the power of Congress to appropriate money to pay a bounty to sugar manufacturers producing sugar meeting a certain test was challenged. Congress had passed an appropriation act (28 Stat. 910) appropriating money to pay a bounty of two cents a pound to producers and manufacturers of sugar if the sugar produced or manufactured should meet a certain quality test. The sole authority relied on for this appropriation was the power granted to Congress by the Constitution to levy taxes to provide for the general welfare. In the earlier case of *Field* v. *Clark,* 143 U. S. 649, the Supreme Court had declined to pass on the question whether the Constitution empowered Congress to grant bounties to sugar producers. In *United States* v. *Realty Company* the immediate question before the court was whether the United States, having promised to pay a bounty, even if it had no power to do so, thereby had created a debt which Congress had power to discharge by an appropriation.

The court said:

> It is unnecessary to say here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises.

The court decided that Congress had the power to appropriate money to pay a debt arising only from the moral obligation of the nation "although the debt could obtain no recognition in a court of law." The court said:

> Under the provisions of the Constitution (Article I, Section 8) Congress has power to lay and collect taxes, etc., "to pay the debts" of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object.

By what sort of reasoning can it be argued that the same language which authorizes Congress to appropriate money to pay a debt not incurred in the discharge of a power specifically enumerated in the Constitution does not also authorize Congress to appropriate money to achieve a national purpose essential to the general welfare?

Judge Merrill E. Otis, on November 2, 1934, delivered an opinion of *Missouri Utilities Company* v. *City of California, et al., supra,* in a case which involved the same questions as those presented in this suit, in which he said:

> My conclusion is that the Congress has the power to appropriate money for the promotion of the general welfare and that it is not restricted in so doing to objects germane to its other delegated powers. Congress therefore has the power to appropriate money for the relief of any condition of unemployment which is not merely local but is national in its extent and hence inimical to the general welfare.

The wisdom or expediency of appropriations by Congress to promote the general welfare and accomplish purposes found by Congress to be national is not subject to review by this court.

The Supreme Court of the United States has consistently adhered to the principle that the wisdom or expediency of enactments by Congress is not a proper subject for judicial review.

> The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without entrenching upon the domain of another Department of Government. *Inter-State Commerce Commission* v. *Brixson,* 154 U. S. 447.

In *Northern Securities Co.* v. *United States,* 193 U. S. 197, the Supreme Court stated:

> If the statute is beyond the constitutional power of Congress, the court would err in the performance of a solemn duty if it did not so declare. But if nothing more can be

> said than that Congress erred * * * the remedy for the error and the attendant mischief is the selection of new Senators and Representatives who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

In the case of *Smith* v. *Kansas City Title & Trust Co., Supra,* the Court said:

> It is urged, the attempt to create these Federal agencies, and to make these banks fiscal agents and public depositories of the Government, is but a pretext. But nothing is better settled by the decisions of this Court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the Government to question its motives. Citing *Veazie Bank* v. *Fenno,* 8 Wall. 533, 541; *McCray* v. *United States,* 195 U. S. 27; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 147, 153, 156.

That Title II of the National Industrial Recovery Act does effectuate the purposes declared national by Congress and the general welfare can be seen from the results. During the last few months in which the program has been in full swing weekly reports on public works projects (including railroad and federal) show that direct employment has averaged 600,000 men. In addition, production of enormous quantities of building materials

necessary to construct the many projects has resulted in indirect employment estimated by statisticians at about 1,200,000 men. Recognizing that the primary function of any sound and economic social life is the satisfying of the basic needs of food, clothing, and shelter, there would seem to be no question that an Act pursuant to which there is placed in the hands of approximately 1,800,000 men theretofore unemployed the means with which to obtain such necessities for themselves and their families through labor promotes the economic recovery and so the public welfare. Furthermore, it cannot be disputed that the construction throughout the United States of permanent useful public improvements in and of itself contributes to the general welfare by making available the conveniences of life through social service heretofore denied many of our people, and by increasing in a large measure the capital assets of the nation.

The United States of America is a national government with sovereign powers

In the Gold Clause Cases (Feb. 18, 1935) Mr. Justice Hughes declared (p. 11):

> The Constitution grants to the Congress power "To coin money, regulate the value thereof, and of foreign coin." Article 1, Sec. 8, par. 5. But the Court in the legal tender cases did not derive from that express grant alone the full authority of the Congress in relation to the currency. The Court found

the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve "the great objects for which the Government was framed"—"a national government, with sovereign powers." *McCulloch* v. *Maryland,* 4 Wheat. 316, 404, 407, 4 L. Ed. 579; *Knox* v. *Lee, supra,* pages 532, 536 of 12 Wall.; *Julliard* v. *Greenman, supra,* page 438 of 110 U. S., 4 S. Ct. 122, 125. The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. *Julliard* v. *Greenman, supra,* pages 439, 440 of 110 U. S., 4 S. Ct. 122, 125.

McCulloch v. *Maryland, supra, U. S.* v. *Gettysburg Railway Company, supra; Smith* v. *Kansas City Title and Trust Company, supra,* declare that the Constitution is a living instrument furnishing a perpetual sanction to the legislative authority, within the limits of a just discretion, to take into consideration the wants and demands of society and to adopt appropriate measures to meet any sit-

nation which threatens the general welfare of the nation. The United States of America is a nation, and Congress has power to meet whatever emergency may arise to threaten its life. By the Recovery Act, Congress declared an emergency. When millions are unemployed the fighting power of the United States is being undermined. Congress has constitutional power to make appropriations to protect the nation not only from armed attack by a foreign enemy but from the destruction of its citizens by reason of the collapse of the economic system. As means to that end it may apply appropriations to finance the employment necessary to restore and preserve the proper functioning of the economic system.

It is not deemed necessary to discuss at length the question whether the welfare clause is a mere limitation on the taxing power. In Chapter IV, Twilight of the Supreme Court, Edward S. Corwin (1934), Professor Corwin says:

> While adoption of the Constitution was pending some of its opponents made the charge that the phrase "to provide for the general welfare" was a sort of legislative joker which was designed, in conjunction with the "necessary and proper" clause, to vest Congress with power to provide for whatever it might choose to regard as the "general welfare" by any means deemed by it to be "necessary and proper." The suggestion was promptly repudiated by advo-

cates of the Constitution (See Storey, Comm., Secs. 907, 908) on the following grounds. In the first place, it was pointed out, the phrase stood between two other phrases, both dealing with the taxing power—an awkward syntax on the assumption under consideration. In the second place, the phrase was coordinate with the phrase "to pay the debts", that is, a purpose of money expenditure only. Finally, it was asserted, the suggested reading, by endowing Congress with practically complete legislative power, rendered the succeeding enumeration of more specific power superfluous, thereby reducing "the Constitution to a single phrase."

In the total this argument sounds impressive, but on closer examination it becomes less so, especially today. For one thing, it is a fact that in certain early printings of the Constitution the "common defense and general welfare" clause appears separately paragraphed, while in others it is set off from the "lay and collect" clause by a semicolon and not, as modern usage would require, by the less awesome comma. * * *

Then as to the third argument—while once deemed an extremely weighty one—it cannot be so regarded in light of the decision in 1926 in the case of *Myers* v. *United States.* * * * the Court held on that occasion that the opening clause of Article II of the Constitution which says that "the executive power shall be vested in a President of the

> United States", is not a simple designation of office but a grant of power, which the succeeding clauses of the same article either qualify or to which they lend "appropriate emphasis" (272 U. S. 118, 128). Granting the soundness of this position, however, why should not the more specific clauses of Article I be regarded as standing in a like relation to the "general welfare" clause thereof? * * *
>
> Assuming, nevertheless, that it is only by *spending* that the national legislative power may constitutionally provide for "the general welfare", the question still remains, what is that "general welfare" which Congress may thus promote? * * *

After discussing the Hamiltonian and Madisonian constructions and the practice of Congress in effect adopting the former and citing instances (in addition to those heretofore cited in this brief), to wit: the purchase of a library by the National Government, of paintings, of services of a chaplain, donations to the wretched sufferers of Venezuela, the dispatch of the Lewis and Clark Expedition to the Pacific, the learned author concludes that Congress "may continue to appropriate the national funds without judicial let or hindrance" (p. 176).

It seems that the power of Congress to determine what is a national purpose may not be reviewed by the courts. At least the Supreme Court has never exercised its power to review such declarations by Congress. The *Gettysburg* case, the *Sugar Bounty*

case, the *Farm Loan Bank* case, the *Boulder Canyon Project Act* case strongly indicate that if the court has such power it is loath to exercise it. It is declared in the *Frothingham* case and elsewhere that the judiciary *per se* has no duty to require Congress or the Executive to adhere to the Constitution. It is only where it appears that rights are involved which the court has power to enforce that it will consider the question, and then only where the plaintiff shows that the act challenged will cause him direct injury. It is, indeed, difficult to imagine a case where the mere expenditure of Federal money will cause direct injury to anyone. It may cause loss as in the case of Government aid to a competitive enterprise, either public or private, through aiding such enterprise to avail itself of an existing market. Our economic life is based upon competition. Federal aid to an enterprise having a right to compete in the market does not constitute the invasion of any legal right. For these reasons it is deemed unnecessary to reply further to the contention of the appellee that the grant in aid of the Coeur d'Alene project is not for what the appellee concedes a public purpose. The courts have long ago denied the contention that the taxing power might not be exercised to finance municipal enterprises for the sale of water and electric power. In *Jones* v. *City of Portland* (*Me.*), 245 U. S. 217, the court held an act of the State of Maine authorizing cities to establish fuel yards for the purpose

of selling fuel to their inhabitants did not deprive taxpayers of due process of law within the meaning of the Fourteenth Amendment. The court said that what was or was not a public use was a local question. The Supreme Court of Idaho has long ago decided that the establishment of municipal waterworks and electric facilities by cities was a "public use."

In *Arizona* v. *California,* 283 U. S. 423, Arizona urged that the declaration of Congress in the Boulder Canyon Project Act, that the purpose of the act was to improve the navigation of the Colorado River, was a mere subterfuge and false pretense (p. 455). The court said:

> Into the motives which induced members of Congress to enact the Boulder Canyon Project Act this court may not inquire. (Citing *McCray* v. *U. S.,* 195 U. S. 27, 53–59; *Weber* v. *Freed,* 239 U. S. 325, 329–330; *Wilson* v. *New,* 243 U. S. 332, 358–359; *U. S.* v. *Doremus,* 249 U. S. 86, 93–94; *Dakota, etc., Co.* v. *South Dakota,* 250 U. S. 163, 187; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 161; *Smith* v. *Kansas City, etc., Co.,* 255 U. S. 180, 210.) The act declares that the authority to construct the dam and reservoir is conferred, among other things, for the "purpose of improving navigation and regulating the flow of the river." As the river is navigable and the means which the act provides are not unrelated to the control of navigation (*U. S.* v. *River Rouge*

Improvement Co., 269 U. S. 411, 419), the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary is not for this court to determine. Compare *Fong Yue Ting* v. *U. S.,* 149 U. S. 698, 712–714; *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, 340; *U. S.* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 65, 72–73; *Everards Breweries* v. *Day,* 265 U. S. 545, 559.

Appellee further contends that public funds may not be expended to promote a "public purpose when there is no public necessity as where the need has already been provided for by private enterprise." Whether or not there is public necessity and whether the need has been adequately provided for is a question for local authority. Federal officers may adopt their finding. In enacting and appropriating funds for the accomplishment of Title II of the Recovery Act, Congress intended to accomplish certain national purposes—the provision of employment, the increase of purchasing power, the regeneration of the industrial system by the quickening effect of Federal expenditures, veterans' preference, etc. That there was need for the provision of employment the fact of more than ten million unemployed workers usually employed is ample evidence. That there was need for Federal expenditure of Federal funds to regenerate construction and through it pro tanto the economic

system of the country is amply attested by the decline in the expenditures of the building industry, which was at least 80% of 1929 standard idle in June 1933. That many veterans were without jobs also clearly appears. It was because private enterprise was unable to provide employment that the National Government made provision for it.

Congress omitted in the Recovery Act to require that the facilities to be financed through that Act should be only those which did not compete with private enterprise. Many public works of the categories authorized to be included in the comprehensive program (Section 202) and financed (Section 203) are competitive—waterworks, markets, tunnels, bridges, river and harbor improvements by reason of competition with railroads, low-cost housing with existing housing, public hospitals with private hospitals, drydocks with existing drydocks. If the Administrator had adopted such a rule as that contended for by the Appellee he would have departed from the plain intention of Congress. The Act invests the Administrator, at the direction of the President, with the discretion to finance or not to finance projects according to their judgment of comparative social desirability. Accordingly the Administrator has adopted the policy complained of by the appellee of preferring such municipal electric enterprises as will produce economies to cities over purchased power or provide electric rates lower than those provided

by existing utilities if at such lower charges or rates the enterprises are self-liquidating. This test of desirability is within the discretion conferred. As the Act authorized the financing of such municipal enterprises and as the funds available were insufficient to finance all enterprises applying for aid, it has been necessary to apply a reasonable test.

The appellee complains that for the Administrator to finance or not to finance municipal enterprises competing with utility companies according to such test is invasion by the National Government of the powers of the States and of the State of Idaho in this case. But the purchase of bonds and the making of a grant in aid of an enterprise does not affect the power of the State to regulate rates of utility companies. The State of Idaho does not regulate municipal electric rates.

Appellee argues further that the promotion or stimulation of private industry is not a public purpose. (Counsel defines the City's project as private.) It intends as a corollary of this, that Congress may not appropriate national funds to promote or stimulate private industry. Such a statement betrays an astounding ignorance of the National Government since its institution. The Tariff Acts have stimulated private industry, ship subsidies, grants of empires in lands to railroads. The Government financed the two banks of the United States. Aid to private enterprise has become commonplace. Neither the Constitution of

the United States nor any decision of the Supreme Court inhibits the National Government from disposing of its money or property as it sees fit. There have been innumerable occasions of the appropriation of national funds to private individuals as gratuities. But it has long been established that municipal waterworks and power systems are public, not private.

The discretion of the President and of the Administrator conferred by title II, sections 202, 203, is not subject to review by the courts

The bill contains allegations attempting to show that the agreement by the Administrator to aid the City in financing its project is an abuse of administrative discretion. It argues that the purposes of Title II of the Recovery Act will not be served by such aid and that it will in effect destroy more employment than it will afford.

Nothing is better settled than that the courts may not review the exercise of administrative discretion reposed in officers of the Government by acts of Congress in the absence of palpable abuse. Congress has authorized the President and the Administrator to determine what projects shall be included in the comprehensive program and, if so included, how they shall be financed. These officers have included the project challenged in the comprehensive program and have determined the manner in which financial aid will be extended. The allegations of the bill do not amount to a statement of palpable abuse of discretion.

While the direct employment on the project may be small, the purchase of the necessary materials will provide employment. The funds applied to the project will have a regenerative effect towards industrial recovery. While this project alone may not further substantially the purpose of the Recovery Act, it is an item of a great nation-wide aggregate made up of many such items.

Houston v. *St. Louis Independent Packing Company,* 249 U. S. 479, 329, S. Ct. 332, 63 L. Ed. 717; *City of New Orleans* v. *Payne,* 147 U. S. 261, 13 S. Ct. 303, 37 L. Ed. 162; *Interstate Commerce Com.* v. *Chicago & Alton Ry. Company,* 215 U. S. 479, 30 S. Ct. 163, 54 L. Ed. 291; *Johnson* v. *Drew,* 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88; ***Decatur*** **v.** *Paulding,* 14 Pet. 497, 10 L. Ed. 599; *Burfenning* v. *Chicago St. P. M. & O. Ry. Company,* 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; *Smith* v. *Hitchcock,* 226 U. S. 53, 33 S. Ct. 6, 57 L. Ed. 119; *Ark. Wholesale Grocer's Assn.* v. *Fed. Trade Comm.* (C. C. A., 8th) 18 F. (2d) 866.

The fact that the administration of the Act affects matters not directly subject to the control of Congress such as reduction of rates by private companies through municipal competition cannot affect the validity of the Act if its broad purpose lies within the powers of Congress. *U. S.* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 72, 73; *Alabama Power Co.* v. *Gulf Power Co.,* 283 Fed. 606, 613; *Waters* v. *Philips,* 284 Fed. 237; *Alabama* v. *U. S.,* 38 Fed. (2d) 897; *Green Bay Canal Co.* v. *Patton Paper Co.,*

172 U. S. 58; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Northern Securities Co.* v. *U. S.,* 193 U. S. 197; *Smith* v. *Kansas Title & Trust Co.,* 255 U. S. 180. In the Gold Clause Cases, Mr. Justice Hughes said:

> We have not attempted to summarize all the provisions of these measures. We are not concerned with their wisdom. The question before the court is one of power, not of policy.

In *Missouri Utilities Company* v. *City of California, et al.,* Judge Otis concluded his opinion with respect to the validity of the acts of the Administrator alleged in that case to be an abuse of discretion with the following statement:

> If Congress has exercised its power unwisely, if the executive officers of the government have exercised the power conferred on them unwisely, if through lack of wisdom and of foresight they are doing damage to the republic and its people far outweighing the good they are accomplishing, those are unfortunate possibilities in every government. The Constitution of the United States, which is strong enough to provide for any emergency, provides also a sure remedy against the incompetence of men in office. It makes their terms in office relatively short.

Delegation of legislative power

The plaintiff challenges the legality of the loan and grant agreement on the ground that insofar as Title II, Section 203, empowers the President or

the Administrator to select projects for financing, it is an unconstitutional delegation of legislative power. Plaintiff's counsel rest this point in large measure upon *Panama Refining Company et al.* v. *Ryan et al.,* Supreme Court, October term, January 7, 1935, which declares Section 9, subsection (c), of Title I of the National Industrial Recovery Act an unconstitutional delegation of power to the President. That subsection authorized him to prohibit the transmission in interstate and foreign commerce of petroleum in excess of the amounts permitted to be produced or withdrawn from storage by State legislation. Violations of such orders as the President might make in the premises were authorized to be penalized by fine and imprisonment. The orders of the President authorized by this section were necessarily regulations under penalty of conduct of a large group of persons engaged in the production and sale of oil. The constitutional power of the Congress to delegate to the President discretion to select projects to be aided by Federal financing is in a category far removed from the power to prescribe rules of conduct. A loan and grant to a municipality to finance its project is not a regulation of conduct. No city is required to accept such loan or grant. No duty is imposed upon them by the act of Congress or by the President's action thereunder with penalty or otherwise. Their conduct is not regulated, they voluntarily agree to the conditions attached to the

loan which have the effect of promoting the purposes declared by Congress, primarily the provision of nation-wide employment. The conditions prescribed by the loan and grant agreement are conditions attached to the disposition of property of the United States and they are analogous to the conditions required in connection with the sale or lease of public lands. The relations between the borrower and the Government are not in the nature of rules of conduct which are imposed by the authority of Congress to legislate but are contractual obligations. If, in the oil clause, Congress had empowered the President to make contracts with the producers of oil whereby they would agree not to make shipments in contravention of State laws, the question of delegation would be analogous to that presented to this court.

Title I of the Recovery Act is legislation in the sense of rules of conduct, the violation of which is penalized by fine and imprisonment. Title II constitutes directions to the Executive as to the spending of the appropriations authorized. The loan and grant agreements authorized by Title II to be made on such terms as the President shall prescribe are voluntary agreements. They are not laws or orders affecting private rights.

On page 22 of the court's decision in the oil case it is said:

> We are not dealing with action which, appropriately belonging to the executive prov-

> ince, is not the subject of judicial review, or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority depends on determination of fact, those determinations must be shown. * * * When the President is invested with legislative authority, as the delegate of Congress, in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation.

The President has not been invested by Title II with legislative authority but with power to expend appropriations and to execute contracts providing the terms of loans and grants to public bodies authorized by the laws of the States to enter into such contracts. To show the distinction between action appropriately belonging to the executive province and orders and rules amounting to legislation the court (Note 15) cited a number of cases. *United States* v. *Chemical Foundation,* 272 U. S. 1, determines the validity of the provision of the Trading with the Enemy Act empowering the President to seize and sell the property of enemy aliens. The court says,

page 12, that this delegation was within the established exceptions as to the delegation of power such as are expressed in *Field* v. *Clark,* 143 U. S. 649, 692; *Buttfield* v. *Stranahan,* 192 U. S. 470, 496; *Union Bridge Company* v. *United States,* 204 U. S. 364, 377; *United States* v. *Grimaud,* 220 U. S. 506, 516.

While the real lawmaking power (rules of conduct with penalties) of Congress may not be delegated, discretionary authority may be granted to executive or administrative authorities to determine in specific cases when and how the powers legislatively conferred are to be exercised and to establish administrative rules and regulations fixing in detail the manner in which the requirements of the statutes are to be met and the rights therein created to be enjoyed. A leading case is *Field* v. *Clark, supra.* Section 3 of the Tariff Act of October 1, 1890, provided that:

> Whenever and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States, he may deem to be reciprocally unequal and unreasonable, he shall have the power, and it shall be his duty to

> suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just.

It was argued to the court that the statute vested in the President an unconstitutional discretionary power to determine when certain taxes should and when they should not be levied and collected. The Supreme Court upheld the grant of power, saying with reference to Section 3 of the statute:

> It does not in any real sense, invest the President with the power of legislation * * * Congress itself prescribed in advance, the duties to be levied, collected, and paid on sugar, molasses, coffee, tea, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President.

Buttfield v. *Stranahan,* 192 U. S. 470, involved an act of Congress authorizing the Secretary of Treasury to establish standards, upon recommendation of a board of experts, by which should be determined the purity, quality, and fitness for consumption of teas sought to be exported into the United States, and to exclude from importation such teas as would not satisfy these requirements. In upholding the constitutionality of this act, the Supreme Court stated:

> We are of opinion that the statute, when properly construed * * *, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.

J. W. Hampton, Jr., & Co., 276 U. S. 394, involved the constitutionality of Section 315 of the Tariff Act of September 21, 1922, which delegated power to the President of the United States to change rates under flexible tariff provisions. Mr. Chief Justice Taft, in delivering the opinion of the Court which upheld the constitutionality of the Tariff Act, stated:

> The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.

The Chief Justice cited with approval Judge Ranney of the Ohio Supreme Court in *Cincinnati,*

Wilmington, and Zanesville Railroad Co. v. *Commissioners,* 1 Ohio St. 77, 88:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Other cases in which the Supreme Court has upheld the delegation of power to exercise discretion in the carrying out of a congressional act are: *St. Louis, Iron Mt. & So. Ry.* v. *Taylor,* 210 U. S. 281 (Interstate Commerce Commission authorized to designate standard height and maximum variations of drawbars for freight cars); *United States* v. *Grimaud,* 220 U. S. 506 (Secretary of Agriculture given power to prescribe regulations for use of national forest reservations); *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194 (Interstate Commerce Commission authorized to require carriers to keep accounts in specified manner). Additional cases are collected in 51 Mich. L. Rev. 986 (1933).

By Title II of the Recovery Act and by the appropriation acts financing it Congress committed to the Executive the duty of expenditure in the manner prescribed by Sections 202 and 203. The expenditure of appropriations is an executive function. Congress as a legislative body pre-

scribes categories of projects which the Executive may finance with a view to providing employment quickly (Section 202). The selection of projects within those categories is an administrative matter and is not legislative. The standards set by Congress to guide the administration of the act are: (1) consistency with a nation-wide program of public works and which would have the effect of developing national resources and useful public services, thus adding to the capital assets of the nation; (2) quick increase of employment on a nation-wide scale. The only feasible method by which a public-works program of the nature and scope which Congress desired to effectuate could be carried out was by conferring broad discretion upon the President, through the Administrator and through such other agencies as he might deem necessary, to carry into effect the purposes and policies set forth by Congress.

In *Gallardo, Treasurer,* v. *Puerto Rico, etc., Light & Power Co.,* C. C. A., 1st Circuit, 18 Fed. (2d) 918, the court determined that the Puerto Rico Water Power Act laying out a scheme for the development, providing means for it, and giving adequate general directions was not invalid as a delegation of legislative powers to the Commissioner of the Interior (p. 922).

From a review of the cases in which the Supreme Court has reviewed acts of Congress delegating power to the Executive it is clear that the court

is concerned that due process of law affecting private rights should be provided. Penalties sought to be enforced under administrative orders or such orders affecting private property are required to be based on findings supported by adequate evidence. But the court has never assumed to review delegations to the Executive to expend appropriations. No private plaintiff can raise the question. A justiciable controversy is not presented.

CONCLUSION AND SUMMARY

The loan and grant agreement expresses the understanding between the Government and the City of Coeur d'Alene. Its legality is challenged as *ultra vires* of the Government, but *ultra vires* or not its performance invades no right of the appellee. The appellee has no right to be free of private or governmental lending or grants or gifts to its municipal competitor. The appellee's prospective loss is a mere *damnum* and that *damnum* does not flow from the loan or grant but from the exercise of a right given the defendant city by the laws of Idaho. The prospective competition by the City is not "illegal competition." The only illegality claimed (so far as the Government is concerned) is that the loan and grant is *ultra vires* of the Government's powers. But the appellee is not in a position to challenge such alleged *ultra vires* action. It fails to show that it will suffer direct injury. Furthermore the action is not in fact *ultra vires*. Congress has power to declare purposes national and to pro-

mote them by appropriations although such purposes may not be subject matters which the Constitution authorizes it to *regulate*. The Supreme Court deems the question whether the purposes declared national are so in fact non justiciable. It has been the practice of the National Government since its institution to declare certain purposes national and to effectuate them by appropriations. The expenditure of national funds to provide employment by financing a nation-wide construction of public works is in accord with this long established practice. A practice so long continued and exercised without judicial interference constitutes an established construction of the Constitution.

Title II, Sections 202 and 203, N. I. R. A., is not legislation in the sense of a command under penalties applicable to the people or to any group thereof, but directions to the Executive prescribing the method of expending an appropriation. The limitations on the delegation of legislative power are inapplicable. In any event the Act prescribes standards to guide its administration, and these standards are sufficiently definite to satisfy the rules as to delegation of legislative power. Courts will presume that Congressional legislation is constitutional unless the contrary is clearly shown. *United States* v. *Delaware and Hudson Company*, 213 U. S. 366; *United States* v. *Coombs*, 12 Peters 72; *Concordia Fire Insurance Company*

v. *State of Illinois,* 292 U. S. 539; *Whitney* v. *State of California,* 274 U. S. 357.

Accordingly it is urged that this court reverse the order of the District Court granting an injunction *pendente lite* and denying the motion to dismiss and order this suit dismissed.

Respectfully submitted.

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U. S. GOVERNMENT PRINTING OFFICE: 1935